VOLUME VII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record
In 9 Volumes

Volume VII
(Pages 2901 to 3254)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

The Court: All right. Plaintiffs' 13.

Mr. Williams: This assumes that the defendants have a monopoly power, and that is a question for the jury.

Mr. Dixon: That is true, counsel, but this is a general statement.

The Court: Well, I am willing to add to it, "whether monopoly power existed in a defendant or defendants, and whether such power was misused is a question of fact for the jury."

Mr. Dixon: I might say in general, your Honor, that there are some requested instructions which deal with monopoly power, what it is, and doing precisely that. This is just intended to be a general statement of what the law is with reference to the use of monopoly power, however lawfully acquired, because one of the defenses of the defendants here is that whatever monopoly power they have is lawfully acquired because they are a marketing co-op, and as to that I would have no disagreement.

The Court: Any other objections to 13 as proposed by the plaintiff?

Mr. Williams: Yes.

The Court: I will hold up my suggestion for an addition to it to see what else we have got.

Mr. Williams: We don't believe there is any evidence that justifies the instruction here because this instruction [3534] is applicable to an offense committed by someone possessing monopoly, where the only charge left in the case of conspiracy——

The Court: In the case——

Mr. Williams: Yes; the only question left in the case of conspiracy.

The Court: Conspiracy and actual exercise of monopoly power.

Mr. Williams: No. Exercise of monopoly power, your Honor, is not an offense under the Sherman Act. It is attempt to monopolize, conspiracy to monopolize, and monopolize.

Mr. Dixon: That just isn't my view of the law.

Mr. Williams: It is in the language of the statute.

Mr. Dixon: We will discuss that in a moment, counsel. If you have a lawful monopoly and with it monopoly power, you may use that power to restrain trade and commerce, and if you do, that constitutes a violation of Section 1 of the Act.

The Court: An individual act?

Mr. Dixon: Yes; indeed.

Mr. Williams: Section 1 of the Act requires an agreement between two persons to have a violation.

Mr. Dixon: No; it doesn't, counsel. Well, you may agree to use your monopoly power to restrain trade and commerce.

The Court: Well, now, I don't follow either one of you. [3535] Section 2 says, "Every person who shall monopolize"——

Mr. Williams: This is an individual they are talking about.

The Court: Yes. If one person can do it, then two people can do it.

Mr. Williams: That doesn't follow, your Honor. Two people would get you into conscious parallel

action, which has been rejected by the Supreme Court in the Paramount Theatres case. If you have two people monopolizing, it has to come under conspiracy to monopolize, which is also part of the same section. That is monopolizing by agreement, you might call it, in other words.

Mr. Dixon: Let me make the plaintiffs' position clear here for the record, now, your Honor. It is the contention of the plaintiff that the defendants have monopoly control over product oranges. Now, we start from there. The charge isn't that they monopolized product oranges. The charge is that they had monopoly power over the amount of product oranges that was available for processing, a perfectly legal situation. We start from there. Then we allege in the complaint that they abused the monopoly power. How? By, one, violating Section 1 of the Sherman Act and doing the things alleged, namely, fixing the price, stabilizing it, the price at which they would be made available to processors, and a lot of other things which they could only do if they had monopoly [3536] power.

And under Section 2 of the Act, then they used the monopoly power over the product oranges to follow a plan and a scheme to monopolize the citrus juice business. Not the product oranges, not at all, but the citrus juice market or industry in this area, so that both Section 1 and Section 2 allege violations.

The jury must determine, unless your Honor instructs them on that point, whether they had just the monopoly power to do these things, or the power,

just call it, the power to do it. If they didn't, then, of course, they couldn't do it. But that is why this case in both Section 1 and Section 2 of the Sherman Act charges deals with the use and abuse of monopoly power over the product oranges. That's all.

We are not claiming that they have monopoly power over anything else, but they used that power as part of the combination and conspiracy under Section 1 to restrain trade and commerce in citrus juices, particularly Valencia juices, and under Section 2 to monopolize the citrus juice market represented by the citrus juices processed——

The Court: Conspired to monopolize.

Mr. Dixon: That's right, conspired to monopolize, and as part of it they used the monopoly power over the product oranges.

The Court: I have your point. In other words, you [3537] contend that there was monopoly power to start with.

Mr. Dixon: That's right, which could have been legal.

The Court: Or could have been misused.

Mr. Dixon: Yes.

The Court: Let's consider the objections on 13.

Mr. Williams: Misused only by agreement, because it is misused only by conspiracy under the charges.

The Court: That is what counsel just said.

Mr. Dixon: That gets us back to the original question of Sunkist and Exchange Orange, your Honor, agreeing to use that power for this purpose.

Mr. Williams: There is no statement there must

be a substantial restraint upon interstate commerce.

The Court: Would the section read better if it said, "the use of monopoly power however lawfully acquired through combination, contract or conspiracy, to foreclose competition"?

Mr. Dixon: I don't think it would, your Honor, because this instruction is intended solely to acquaint the jury with the fact that monopoly power, and then it is not defined here, because it is taken care of in subsequent instructions, however acquired, if used for these purposes, violates the Sherman Act, and that is the law, not only in this case cited, but in any other number of cases we might cite that deal with this question.

The Court: Any other objection? [3538]

Mr. Williams: It also should state that the power is used with specific intent to monopolize or to restrain trade.

Mr. Dixon: Not if the jury finds they haven't, counsel.

The Court: Overruled. I will give 13. I will pass up for the time being the suggestion I have at the end. [3539]

Paragraph 14?

Mr. Dixon: 14 may not be necessary, your Honor, in view of the fact that you have already given the other one, that this industry in California is properly subject to restraint.

The Court: All right. 14 withdrawn. Don't hint about withdrawing an instruction, either one of you, because if you do I am going to jerk it right now.

15?

Mr. Dixon: I will keep quiet, your Honor.

The Court: Feel free to speak up, but I am warning you. 15?

Mr. Williams: We object first to the use of the word regulation, because the Sherman Act does not regulate the business. It prohibits certain acts. Regulation is a misnomer. That applies to administrative agencies that have continuing supervision. So that should be changed.

Mr. Dixon: You mean it is not absolute? I have no objection to that change.

The Court: What change? Strike that?

Mr. Dixon: No.

Mr. Williams: Strike "nor exempt from regulation."

Mr. Dixon: It would have to say "is not absolute."

Mr. Williams: "is not absolute." That would improve it somewhat.

Mr. Dixon: This is the language of the cases, but I [3540] have no objection to striking the regulation part.

Mr. Williams: Again, this whole instruction is directed towards an individual offense by Exchange Orange, and it should under the amended pleading relate only to something done pursuant to conspiracy or combination. There is no longer any question of an individual offense by Exchange Orange or by Sunkist.

The Court: Does that complete your objections?

Mr. Williams: No. We also state the evidence does not show that Sunkist had a monopoly of prod-

uct oranges or of any citrus juices, and so the instruction is thus surplusage and should not be given. Also, it assumes that the defendant does have a monopoly.

The Court: Well, the only objection there that interests me is this question of whether or not this refers to some individual offense by an individual defendant apart from combination or conspiracy, and as I understand now, plaintiff disclaims any claim of an offense by an individual.

Mr. Dixon: Well, yes, your Honor; under the attempt part of Section 2, we do not claim that there was any attempt to monopolize here which applies to individuals.

The Court: What do you say to the objection?

Mr. Williams: We will hint it should be withdrawn.

Mr. Dixon: This requested instruction, I think, is most necessary because it deals with a refusal-to-sell charge of [3541] the complaint, and the defendants are going to, of course, argue that they don't have to sell the plaintiff, and they could select their own customers.

Now, I think we should have some instruction upon the right to do that, in other words, to indicate it is not an absolute right, and that where it is exercised as a purposeful means of maintaining a monopoly, that it is prohibited by the Sherman Act.

Mr. Williams: The language "purposeful means of maintaining a monopoly."

The Court: Does this go back to the distinction we have been making between what might be called the general situation of violation of antitrust laws as contrasted with the problem as to whether or not a particular cause of action had been proved? In other words, from the cause of action standpoint, you say you are relying on the conspiracy.

Mr. Dixon: The conspiracy, that is correct, and combination.

The Court: The combination.

Mr. Dixon: That's right.

The Court: Now, further back of that, of course, is the general problem of whether the antitrust laws have been violated.

Mr. Dixon: That is the basic problem.

The Court: One of the instructions I had was you [3542] couldn't recover by merely showing alone that the antitrust laws had been violated.

Mr. Dixon: That I would agree to.

The Court: You would have to go further. Is this a correct statement? This would be a violation of the Sherman Act?

Mr. Dixon: Yes; it is, in my judgment. It is taken direct from the cases, your Honor, the two cases cited.

The Court: What do you say, Mr. Williams?

Mr. Williams: It is trying to state a violation of the Sherman Act by a refusal to sell. Both the Lorain Journal and the Fairfax Linen cases involve refusals to sell by an individual defendant. The Fairfax was an attempt to monopolize, and the Lorain Journal was also that.

This has no place any more. It can only prejudice the jury and mislead them.

The Court: This doesn't talk about an attempt to monopolize. It talks about maintaining a monopoly which might be already existing.

Mr. Dixon: That is our contention.

Mr. Williams: The only monopoly in this case, your Honor, as counsel conceded a few minutes ago, from his position the only monopoly in the case is one on product oranges and there is nothing in the complaint about miantaining a monopoly on product oranges. [3543]

Mr. Dixon: The complaint alleges in Section 2 they combined to monopolize and monopolized.

Mr. Williams: But it doesn't charge they combined to maintain a monopoly in juices. That is what this relates to.

Mr. Dixon: Certainly. They were maintaining a monopoly. They would have to combine together to do it and they did. I mean the facts show that there was a monopoly, and it is applied to certain of the single-strength juice and it was maintained by reason of the refusal here to—one of the things was the refusal to sell to the plantiff or make an arrangement available to him.

The Court: Objection overruled. I will give 15. 16?

Mr. Dixon: I think, your Honor, this one may be perhaps withdrawn. It was drawn at the time of the attempt——

The Court: Strike "perhaps" from the record. Withdrawn.

171 Well, I suppose the word "creating" would come out on line 7 for one thing.

Mr. Dixon: Yes.

Mr. Williams: Our first objection is that this again is stating the attempt-to-monopolize theory and should go out because that is out of the case.

Mr. Dixon: This is a violation of both Section 1 and Section 2 of the Act, counsel. [3544]

The Court: First this creating would come out, wouldn't it? Creating a monopoly control? That would be part of the attempt.

Mr. Dixon: Conspiracy, your Honor, to create. The Section 2 count as it now stands is that they conspired to monopolize and did monopolize. In other words, the act of conspiring again without any factual action there.

The Court: They are not talking about conspiracy here. This is predicated entirely on refusal to give a comparable contract.

Mr. Dixon: Oh, yes; I see your point.

The Court: One defendant refusing to give a comparable contract for the purpose of creating or maintaining.

Mr. Dixon: Yes.

The Court: I wonder, to start with, if creating oughtn't to come out of there?

Mr. Dixon: Your Honor, let me make this suggestion. Let's pass this.

The Court: You might withdraw it?

Mr. Dixon: I might withdraw it. Let's pass this for the time being, because I have some more spe-

cific instructions which I prepared later which will present this problem a little more specifically.

The Court: All right.

Mr. Fowle: Have we received those? [3545]

Mr. Dixon: Yes; you have, counsel.

The Court: 18. Read it over first. That is very similar to 17.

Mr. Dixon: Yes. Let's pass that for the moment.

The Court: Pass 18. 19?

Mr. Dixon: This instruction, your Honor, relates to the degree of proof required, the type of proof, rather, required in this kind of situation as applied to the facts of this case.

The Court: It involves the intent, doesn't it? Intent is necessary. I am just paraphrasing it to get the substance of it.

Mr. Dixon: Yes.

The Court: The plaintiff need not show by direct evidence that the refusal of EOP to enter into a comparable contract was pursuant to a purpose of EOP or Sunkist to eliminate. It is not necessary to show by direct proof the purpose to eliminate competition of plaintiff or to create and maintain a monopoly.

Mr. Dixon: The hub of the instruction is the last sentence.

The Court: Well, let's see whether it applies to this.

Mr. Dixon: This is a conspiracy charge here, your Honor.

Mr. Fowle: It looks to us like intent to monopolize. It is discussing the specific intent which is

necessary for [3546] the attempt to monopolize. It deals with an individual act of Exchange Orange.

Mr. Dixon: Let's pass this, if you want to, for the time being, your Honor.

The Court: Pass 19. 20?

Mr. Dixon: Again we can pass this, because of the withdrawal of the attempt charge, but I don't want to leave it out entirely at this time, but let's pass it until we get to the new ones.

The Court: All right. 21?

Mr. Dixon: Well, this is out because it is a Robinson-Patman Act charge.

The Court: That would be attempt there, wouldn't it? The third cause of action is out.

Mr. Dixon: Yes.

The Court: 21 is out. 22.

Mr. Williams: That is Robinson-Patman, isn't it?

Mr. Dixon: Yes. Take this out.

The Court: 22 out. 23?

Mr. Dixon: This is on damages.

The Court: What are the defendants' objections?

Mr. Williams: The most recent case in this Circuit on the subject of damages is this Wolf against National Lead Company, 225 F. 2d, 427. That uses the language we would [3547] prefer to this language. It states that the rule which precludes the recovery of uncertain damages applies to such as are not a certain result of the wrong, not to the damages which are definitely attributable to the wrong, but only with respect to their amount. That

is a simpler statement than the one in the instruction.

The Court: Have you presented an instruction on it?

Mr. Williams: No; we haven't as yet.

The Court: It might be possible to use them both if there are no inconsistencies between them, but this is a correct statement of the law, isn't it? [3548]

Mr. Fowle: As it is cast it has certain aspects of it that I think would be prejudicial.

The Court: I see one line that I am going to suggest come out.

Mr. Fowle: Because the instruction starts off dealing with this particular case, it refers to the plaintiffs' business or property being injured, then in the next sentence, "Since proof of the damages suffered may be difficult, 'The wrongdoer may not object to the plaintiffs' reasonable estimate,' "— that assumes in three different places here that the defendants are wrongdoers.

The Court: I don't follow you on that.

In these general instructions where you state principles, you can't state that they are assuming anything. They are stating principles of law. The jury may find that it applies or may not apply.

The sentence that I think doesn't belong in there, though, is the one that starts at 4. You are going to help the jury, now, estimate damages. "If you as jurors should determine that plaintiffs' business or property was injured by activities in restraint of trade, the question will arise as to how plaintiffs'

damages should be computed." Then comes this sentence:

"One whose business or property has been injured by the activities of a combination in [3549] restraint of trade is entitled to damages."

Standing by itself that is a very general statement and is subject to a lot of ifs and ands.

Mr. Dixon: That is right, your Honor.

The Court: And I think that should come out.

Then you would go from the first sentence, how should they be computed.

Mr. Dixon: Then you can start——

The Court: "since the proof of damages may be difficult, 'The wrongdoer may not object to plaintiffs' reasonable estimate * * *' "

There is no assumption that anybody is a wrongdoer. It starts out with "If." "If you as jurors." If you reach this part of the case.

Mr. Fisher: It is coupled right there——

Mr. Fowle: The first sentence is not just a statement of a general principle of law. That is referring to this particular case, and the next thing we are talking about wrongdoers in three different places.

You have a statement that relates to this particular case, coupled with principles of law——

The Court: If you determine that plaintiffs' business was injured by activities in restraint of trade, the question will arise how should damages be computed.

Now, if you reach that far, then you have concluded that [3550] there was a wrongdoer. So even on your argument I don't see any point to that.

Mr. Williams: It should be "interstate trade and commerce," rather than just "trade."

The Court: All right.

Mr. Williams: I think it should be "substantial restraint of interstate trade and commerce."

The Court: I will insert in the second line, so that it will read, "by activities in restraint of interstate trade and commerce."

Mr. Williams: We also ask that "substantial" be inserted in front of "restraint." Actually it should be "substantial and unreasonable."

The Court: There could be another instruction, if that is proper, somewhere else. That doesn't have to go in this one.

This one is if you reach this question.

Mr. Williams: I suggest "substantial and unreasonable."

The Court: "If you as jurors," insert "based on all the instructions in this case."

Mr. Fisher: Your Honor, may I advert again to this word "wrongdoer," because it disturbs me?

This is a quotation from a case, but it appears just before the words "the plaintiffs' reasonable estimate." The jury hearing that is going to couple it with us. [3551]

The Court: Would you feel better if it said, "the defendants may not object"? That pins it down closer. Isn't there something in the Eastman case on this matter of damages, also?

Mr. Dixon: I think so.

This language, I think, is generally used.

I don't have the language of the Eastman case

before me. But the purpose of this instruction is to——

The Court: I instruct the jury, on this question of damages, that they only consider this instruction if they reach that point in the case, and there is no intimation that when I give this instruction that they reach that question.

Mr. Williams: I suggest lines 14, 15 and 16 come out, and then after the three stars in line, I guess it is 13, it is irrelevant that the principle is an ancient one and is not restricted to proof of damage in antitrust suits.

Mr. Dixon: I will take that out. I don't care about that.

The Court: All right. That may go out. Starting with "That principle is an ancient one."

Change "The wrongdoer" to "A wrongdoer." It makes it a little more general.

Mr. Fowle: It is in a quotation.

The Court: Start the quote with the word "Wrongdoer." That doesn't present any problem. A wrongdoer. [3552]

What are your objections to 23? Is there anything more you want to add?

Mr. Williams: I think that covers our objections.

The Court: The objections are overruled. I will give 23 as modified.

24.

Mr. Williams: I suggest that in line 12 the three stars come out and the rest of the line. So it reads, then:

"these are governing principles applying to compensatory damages if unliquidated." [3553]

The Court: I think compensatory or exemplary doesn't add anything.

Mr. Dixon: No. I have no objection to taking that out.

The Court: That may go out. Leave the stars in to show an excerpt. I won't read the stars to the jury.

I think on line 5 it should start out, "If plaintiff is entitled to damages," then recoverable damages include.

Any objection to that?

Mr. Dixon: No.

The Court: By agreeing to some of these changes, you are not agreeing to the whole instruction. That is understood. We are just trying to work these over.

Mr. Dixon: Plaintiff is entitled to damages?

The Court: Actually there are two plaintiffs.

"If plaintiffs are entitled to damages, then recoverable damages include," and strike out the "therefor."

Actually this covers proximate cause, as well as damage.

Mr. Dixon: Yes.

It is a very good instruction, I think, on damages.

The Court: You are modest, aren't you?

Mr. Dixon: Yes.

Mr. Williams: Should "defendant" be "defendants" in line 7? "arising from wrongful acts committed by defendants"? [3554]

The Court: Insert "all defendants."

You have omitted so much there beginning on line 11 that the sentence doesn't make good grammatical construction.

"These are governing principles applying to compensatory damages if unliquidated, when determined by the trier of the facts their propriety cannot be governed"——

Mr. Dixon: There should be a new sentence there, Judge, although this is a quote.

The Court: There should be a period after "unliquidated."

Mr. Dixon: Yes. And then a new sentence.

The Court: Are there any objections now to 24?

Mr. Williams: No. That is all.

The Court: I don't know whether you still have objections or not, but if you have, they are overruled.

I think we have obviated most of them.

25.

Mr. Williams: This is repetitious of 24.

Mr. Dixon: It relates to profits.

The Court: I don't think it is repetitious. This takes into account damages in the future.

Mr. Williams: 24 includes loss of business. Doesn't that include loss of profits?

Anything that is in 25 that is not in 24 should be added to 24, rather than give them separately.

The Court: They are read along. I try to group these [3555] logically when I decide what I am going to give. I shuffle them around. How these wind up it is pretty hard to say, except the chances are

that it will follow 24, and it will sound like it is part of 24.

Any other objections to 25?

Mr. Williams: No.

The Court: Now, in the file that I gave you, I gave you revised 26.

Mr. Dixon: I withdraw that, your Honor, because we have agreed not to have you charge on this subject at all.

The Court: What I did was to modify the bottom part of the section by just striking out "threefold," and then striking out the first sentence, and then letting the second sentence start with the following: "If plaintiff is entitled to recover," and then picking up again, "your interest will be," and so forth.

Do you want to pass it, or withdraw it, or what?

Mr. Dixon: I understood that you were not going to charge on this treble damage feature, and so on, and this was put in before we had that discussion.

The Court: In the set I gave you there is a revised 26. You will find a revised 26. It follows the lettered instructions.

Mr. Dixon: That seems to be all right, as far as the plaintiff is concerned. This one could be used for our [3556] proposed 26, and we will withdraw ours.

Mr. Williams: We will request that the entire section be read, including the treble damage part. So we are willing to accept instruction 26 as originally submitted by the plaintiff.

The Court: The law is pretty clear on that, Mr. Williams, isn't it?

I just picked up the Law Week the other day——

Mr. Dixon: There is a recent decision on that, that you are not supposed to instruct, actually.

Mr. Williams: I haven't been able to read Advance Sheets for quite a while.

The Court: Whether this is necessary or not might be a question, but I am going to approve the redraft as is, and the only thing would be whether it adds anything to what we have got.

Mr. Williams: I think there is a technicality here. I believe Section 7 was repealed in the last session, and the technical reference is under the Clayton Act.

Mr. Dixon: Here is an Advance Sheet on the treble damage instruction.

The Court: I think it is the same case that I saw.

Mr Dixon: It is Sabolsky

The Court: That is it.

Section 7, you say, was repealed? [3557]

Mr. Dixon: It was changed.

Mr. Williams: It was repealed.

Isn't the same language found in Section 15?

Mr. Dixon: The substance has not been changed.

Mr. Williams: The substance has not been changed, but I think the language is identical.

The Court: Let's say, "The law provides, in part," and strike out "Section 7."

Mr. Williams: I think that will do it.

The Court: Then I will reject 26 as proposed and

give, instead, 26 redrafted, subject to the question of whether I will give it at all.

Lots of times you go over these instructions, and when you start to work them over you find repetitions, you find that you think something is covered. I may pull some instructions out later.

Plaintiffs' 27.

Mr. Dixon: This is the one, your Honor, that deals with the so-called price fixing part of the case.

The Court: Where you say on line 16 "to monopolize," do you mean, again, a conspiracy?

Mr. Dixon: Yes.

The Court: Insert "a conspiracy" in front of "to monopolize," on line 16.

Before we start discussion on it, the only question I had [3558] on it was the first sentence, stating something is not in dispute.

I personally think there isn't much dispute, but I just wonder. If I give it, it has to be given by virtue of a stipulation.

I could say that and tell the jury that I was only commenting.

Mr. Williams: We would rather not stipulate to it.

Mr. Dixon: Of course, I don't want you to stipulate to anything that you don't want to stipulate to, but if there is anything that is not in dispute in this record, I would say this is it. But I understand the judge's position on it.

I asked them specifically, Finley, MacMillan, and Silrle, and the answer was yes.

Mr. Williams: If we say this one is not in dispute, I think we can think of some more.

I think it is better to leave out all stipulations in instructions.

Mr. Dixon: I am not asking you to stipulate, counsel.

The Court: Start it out with, "You are to determine whether." I suppose you are going to have to tell them what illegal per se means.

Mr. Dixon: It is illegal per se, or in and of itself and without more.

I mean it is illegal per se, or in and of itself it is [3559] in violation, then go on from there, the Sherman Antitrust Law.

The Court: Insert after "per se," "that is, it is illegal in itself."

All right, the first sentence reads: "You are to determine whether TreeSweet and Silzle were selling," and so forth, and then after "per se" on line 5, insert, "that is, it is illegal in itself and in violation," and so forth.

Line 16, after the words "commerce or" insert "a conspiracy."

What is defendants' objection to 27?

Mr. Williams: Our first objection is that there is no necessary or probable connection between the proposition that TreeSweet and Silzle contracts may have had the effect of fixing prices, and the proposition that such contracts may have been processing contracts, which is the relationship that it tries to state.

The Court: You could skip some of that. You

could say, "If you find that the contracts had the necessary intended effect of fixing or tampering with the price or price structure at which Sunkist, TreeSweet, or Silzle sold single-strength orange juice in interstate commerce, you may consider such fact in determining," and then drop down to, "whether such contracts were in fact entered into."

I agree with Mr. Williams that they could be, in fact, [3560] processing contracts, or not, and your contention would still be tenable.

Mr. Dixon: I have no objection to that.

The Court: Strike out in line 14 "in fact processing contracts or whether."

Mr. Williams: I didn't get that change.

The Court: Line 14, after the words "in determining whether such contracts," and then strike out "were in fact processing contracts or whether they."

Mr. Dixon: "entered into."

The Court: Yes; that is the way it reads. [3561]

Mr. Fowle: I was going to say, your Honor, I don't think there is any logical connection between the first part of this sentence, if you find there was price fixing, and the second part of it, which is, "you may then find that the contracts were in fact entered into as part of the conspiracy to restrain interstate commerce or conspire to monopolize."

Then skipping down a little bit, "as charged by the plaintiff," because the conspiracy that is charged by the plaintiff in the amended complaint doesn't say anything about price fixing. All of which illustrates the point we were trying to make earlier today, that this matter of price fixing is simply

being dragged in by the heels here in an effort to show public injury when it was never pleaded.

The Court: Why don't we do this? I am not agreeing with what you say about being dragged in by the heels, Mr. Fowle. Beginning about 9 you can say, "You may determine whether these contracts," and so forth, so it would read, "You may determine whether the 1951 TreeSweet and Silzle contracts had the necessary or intended effect of fixing or tampering with the price structure," and so forth.

Of course, as far as what you are saying, Mr. Fowle, the plaintiff is merely limiting his position by this instruction. In a way, it is a little hard for you to complain about it, because he is saying in substance, if you consider price fixing, you have got to consider whether it was a [3562] part of a conspiracy to restrain interstate commerce or a conspiracy to monopolize. That is what he is saying.

Mr. Fowle: Well, I am not sure I get your point.

The Court: The plaintiff limits this for those purposes. He tells first it is illegal per se, if you find this situation, it is illegal per se and you may consider such fact in determining such contracts were entered into as part of a conspiracy, so it is a limiting instruction.

Mr. Fowle: Well, I don't really quite follow that, your Honor. You have got a charge here that they were contracts entered into which were said to be in restraint of trade, and it is claimed in the amended complaint that they were offered to some and withheld from others.

The conspiracy that was set forth in the amended

complaint itself prior to the amendment seems to me to be one to favor certain persons and to eliminate competition of others, that there was a conspiracy to do that. It says nothing whatsoever about price fixing.

It seems to me that this proposed instruction illustrates, to use the phrase I used before, how price fixing is being dragged in by the heels. It has nothing to do with the conspiracy that was alleged in the amended complaint, nor is it charged it had any injurious effect upon the plaintiff. Obviously, it couldn't have had any injurious price effect upon the plaintiff. A price fixing arrangement wouldn't have [3563] injured the plaintiff. It would have benefited him.

Mr. Dixon: It has the same relevancy and application, your Honor, in connection with the determination of whether there was a conspiracy as charged, as does the Hyland Stanford-General Foods contracts.

Mr. Fowle: Then we make the same argument about the Hyland Stanford contracts.

Mr. Dixon: Yes; I know.

Mr. Fowle: We come back to this.

The Court: Would this do it? Beginning line 9 with the "if," and then, "you may determine, therefore, whether the 1951 TreeSweet"—and so forth—"had the necessary and intended effect"—and so forth—"in determining whether there was a violation of the antitrust laws."

Mr. Williams: Isn't it conceded they didn't have the necessary effect of fixing prices, that the con-

tracts were lawful standing alone? So that isn't in issue, whether they had any necessary effect.

Mr. Dixon: Oh, yes, it is. I think that is the very point.

The Court: You haven't answered my suggestion. Why not limit it to a question of whether there was a violation of the antitrust laws. That is really the only place it has in the case.

Mr. Dixon: Yes. [3564]

The Court: It isn't part of the thing causing damage to the plaintiff.

Mr. Dixon: No; but that would be part of the acts alleged to be one of the reasons for the combination and conspiracy, Judge. In other words, we do not claim that, assuming that these contracts had the effect of fixing prices and determining prices and eliminating price competition between Sunkist and TreeSweet and Silzle, as the amended complaint now alleges, that the plaintiff suffered any damage as a result of that fact.

The Court: You use it entirely on the matter of the violation of antitrust laws.

Mr. Dixon: That's right.

The Court: Why not say that, then?

Mr. Dixon: Except to merely say it is the violation of the antitrust laws without applying it to the question, the ultimate question to be determined by the jury, and indicate how or why they should consider it, I think would be kind of leaving it up in the air. That is the reason I have used this application of it. I think that certainly is as far as it could be considered by the jury in this case.

Mr. Fowle: I think your Honor has really put your finger on the heart of this problem, that he should say in effect that if you find there was price fixing, you may consider that in determining whether there was a violation of the antitrust [3565] laws. If there was price fixing, I expect that would be violation of the antitrust laws, but what has that got to do with the case? It hasn't been charged. If price fixing was a violation of the antitrust laws, that violation of the antitrust laws did not injure the plaintiff in this case, it seems to me, and it has no place here and it was not pleaded.

Mr. Dixon: It would be one of the reasons, it certainly could be argued, why this arrangement was entered into, your Honor.

The Court: I have this view on that general subject. I may be wrong. But it seems to me my view is that in this kind of a case the plaintiff is entitled to go in and first show the violating of the antitrust laws top to bottom, whatever they were. Then I instruct the jury that isn't enough. He must go in and show particular things that caused damage. But he can't recover unless you have violated the antitrust laws, and he has to then allege particular things that damaged him. But I don't know that you have to tie one of the particular things with every violation you made of the antitrust laws.

Mr. Fowle: I would think you do. I would think you have to show any violation of the antitrust laws which was claimed to have occurred itself had an impact on this plaintiff and injured him with result-

ant damage, and if that isn't so and can't be established, the claim that there was a particular [3566] violation of the antitrust laws has no place in the case even if it had been pleaded.

I might say our principal objection to this instruction No. 27 is that the matter of price fixing was not pleaded in the amended complaint.

Mr. Williams: Your Honor, the statute supports the position of Mr. Fowle, because Section 7 of the Sherman Act, which is the same as the Clayton Act statute now in effect, says:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor"—and so forth.

So that the gist of this action is the injury to the plaintiffs' business or property by reason of something forbidden or declared unlawful by this Act. Now, other matters are immaterial.

Mr. Dixon: It seems to me, at least, it is perfectly clear to me, your Honor, the gist of the wrong here is that the defendants combined and conspired, to do what? To restrain trade and commerce in citrus fruit juices and to monopolize citrus juices processed in California. Now, that is the charge.

Now, the combination then is made specific as to what it was and what acts damaged the plaintiff, assuming that there [3567] was a combination and the jury finds that there is a combination alleged.

Now, this instruction 27 is pointed to the fact that the jury are going to have to determine as a fact, and it will be the ultimate fact here, whether

there was the violation charged in the complaint of Section 1 and Section 2. That is the first thing they must do.

Now, in reaching that conclusion, which they must reach before they ever get to the question of proximate cause and damage, they may consider whether these contracts were entered into as part of a price fixing scheme, as well as the other things that are charged.

Then if they find that there was the conspiracy or combination charged in violation of both Sections 1 and 2, then they must still determine that the plaintiff suffered damage as a result of some of the acts done pursuant to that conspiracy.

In other words, it is not the position of the plaintiff in this case that if all there was was a price fixing conspiracy, that the plaintiff would necessarily have a cause of action based upon that illegal act, unless we were able to make juice and they so stabilized the price and undersold us, and so on. Then the damage would be caused as a result of the price fixing conspiracy. But the damage here resulted from the inability of the plaintiff to have access to the [3568] product oranges so that it was unable to make any single-strength juice. The reason why it didn't have access is the basis of the complaint. But it certainly isn't price fixing. That is why this particular angle of it is limited merely to the consideration which the jury may give this, if any, in determining whether there was a conspiracy and combination charged in violation of both Sections 1 and 2.

The Court: Well, what about this point? I granted your motion to amend, over objection, on the ground that you had alleged at page 10 that for many years last past the defendant in the course of interstate trade and commerce combined and conspired with each other, and have entered into contracts which have had the purpose and effect, and so forth, of restraining interstate trade and commerce.

Since these were the contracts of the defendants and they had been charged in the complaint, I didn't feel that anybody was taken by surprise on price fixing.

Now, would it serve your purpose to pick up there about line 13:

"You may consider such fact," that is price fixing, "in determining whether such contracts," and then pick up the language of the complaint, "had the purpose and effect of unreasonably restraining interstate trade and commerce." [3569]

Of course, I can answer my own suggestion right now, because prior to that allegation you say combined and conspired with each other and have entered into contracts.

Mr. Dixon: I don't think your Honor's suggestion would cover the purpose.

The Court: It clears my thinking, because the language I now have, omitting this thing I just read to you, now have in this instruction is, "in determining whether such contracts were in fact entered into as part of a conspiracy to restrain interstate commerce or a conspiracy to monopolize"——

Mr. Williams: Isn't that the ultimate question?

In other words, at 9 it starts out, "If you find that the TreeSweet or Silzle contracts had the necessary or intended effect of fixing or tampering with prices," and then you conclude from that there is a conspiracy. It seems to me you should start out, "If you find that the TreeSweet or Silzle contracts were entered into as a conspiracy," then some connection would follow, but this has the cart before the horse.

The Court: My thinking is a little bit clarified, but reading this allegation listed as 2 on page 10 of the amended complaint. Are you satisfied with this now, "whether such contracts were in fact entered into as part of a conspiracy"?

Mr. Dixon: You mean and end it there, your Honor? I am sorry. I didn't get the [3570] suggestion.

The Court: Starting line 13:

"You may consider such fact in determining whether such contracts were in fact entered into as a part of a conspiracy to restrain interstate commerce or a conspiracy to monopolize or control production and sale of California single-strength Valencia orange juice in interstate commerce as charged by the plaintiff."

Mr. Dixon: Yes, your Honor, that is satisfactory.

The Court: In fact, I think that that——

Mr. Dixon: That is as far as we could go on it, frankly.

The Court: I think that corresponds more nearly to the complaint.

Mr. Dixon: To the complaint, yes.

The Court: Than what I proposed.

Mr. Dixon: Yes.

The Court: Any other objections?

Mr. Williams: Yes. We have quite a number of them.

The Court: All right.

Mr. Williams: The first is the same objection that I made with respect to proposed Instruction No. 5 relating to the market and the effect of competition from Florida juice, and I ask that those objections be incorporated with respect to Instruction No. 27

The Court: They may be incorporated [3571]

Mr Williams: The next one is that 27 relates only to single-strength Valencia orange juice, when the complaint relates to citrus juice The next one is that——

Mr. Dixon: Well, you can add that, if you want to, "or citrus juices." I don't care about that, your Honor.

Mr. Williams: It also raises the point that——

Mr. Dixon: After the word "Valencia orange juice," or, rather, "citrus juices." I think that is the language of the complaint, the amended complaint. I don't have it before me.

Mr. Williams: We think it should be just citrus juices and omit any reference to single-strength orange juice.

The Court: Which part? At the bottom part or in the middle?

Mr. Williams: All the way through. It should be citrus juices.

The Court: I go along with eliminating it at the end, but the specific thing I call attention to is the

single-strength juice was part of a conspiracy, and so forth, to control the production and sale of canned citrus fruit juices. It would seem to me you might change it at the bottom part.

Mr. Dixon: That's all right at the bottom part, your Honor. California citrus juices?

The Court: California, yes, produced and processed in California. California citrus fruit juices.

Mr. Dixon: Production and sale in interstate commerce. [3572] Can we add after the word "sale," "in interstate commerce"? Or are you going to leave it in at the end?

The Court: Leave it in at the end.

Mr. Fowle: How would your Honor have that read now?

The Court: Line 17, "control the production and sale of California citrus fruit juices in interstate commerce as charged by the plaintiff."

What other objections?

Mr. Williams: The Capper-Volstead Act objection that was made with regard to proposed Instruction No. 2. I ask that that objection be incorporated.

The Court: It may be incorporated. Any other objections?

Mr. Williams: That's all, I think.

The Court: Objections overruled. I will give 27 as modified.

Let's see. We have 28 to 34. Do you want to stand up and stretch a minute?

(Interruption.)

The Court: Now, what about 28? Is that a correct statement of the law?

Mr. Williams: We have the general objection, of course, that it was not pleaded, that we raised before. In fact, I think we have substantially the same objections to this instruction that we had to Instruction No. 27, except some of the particulars relating to that language. [3573]

The Court: Haven't you covered this?

Mr. Williams: It is almost a restatement of what is in 27.

The Court: Not 27.

Mr. Dixon: This is the price maintenance, the potential power for price maintenance as against the actual price fixing itself.

Mr. Williams: There is no evidence in this case that indicates any agreement creating a potential power for price maintenance.

Mr. Dixon: I think that is just the trouble now.

The Court: What's that?

Mr. Dixon: I think that is precisely the trouble, that the pricing provisions of the contracts certainly contain the ingredients of potential power for price maintenance.

Mr. Fowle: 15 per cent discount and 7 per cent discount on top of that? It seems to me that is a pretty wide margin.

Mr. Williams: There is no evidence of actual exertion of the power for that purpose.

Mr. Dixon: Well, as I said, I don't insist too much as far as the plaintiff is concerned. It is coupled with 27.

Mr. Williams: May we incorporate by reference the same objections to 27, except those going to the language of 27?

The Court: All right. Objection overruled. I have made a note "Give, but may not use. If do so, use in connection [3574] with 27." When I look these over again, I will see what has been covered.

Now, 29?

Mr. Dixon: This is the classic and basic statement on price fixing, your Honor. It relates to any tampering. The language here is particularly applicable, any combination which tampers with price structures.

The Court: What is the objection to 29?

Mr. Williams: Our objections are the same as those just made to 28. They include it was not pleaded, and the others that were stated.

The Court: Objection overruled.

Mr. Williams: It incorporates the specific ones to 27 by reference, except the precise language of 27.

The Court: Objection overruled.

30? [3575]

Mr. Williams: Again we have the same objections that we had to 27, except for the precise language of 27. We incorporate them by reference.

The Court: Is this covered in any other?

Mr. Dixon: This is the direct application, your Honor, of the law to the particular contracts. There is nothing to prevent, in other words, under this instruction, defendants from arguing that they were not price fixing contracts.

There, again, it is a question for the jury under

the previous instructions. But without the related instructions, it wouldn't mean much.

The Court: What was the other objection, Mr. Williams?

Mr. Williams: It doesn't state clearly that conspiracy is involved.

In lines 6 and 7 it refers to entering into by Exchange Orange as part of the scheme or plan. It should be as part of a conspiracy. That would be a clearer statement, because you have to find the agreement.

The essential part of the conspiracy is not mentioned.

The Court: Can we add "conspiracy, scheme or plan," and tell the jury they all mean the same thing?

Mr. Williams: We object to "scheme or plan," and ask that the word "conspiracy" be inserted for them, instead of added.

The Court: Is there any objection to that? [3576]

Mr. Dixon: No, I don't think so, your Honor.

What was that now?

The Court: Insert "conspiracy," in place of "scheme or plan."

The objections are overruled.

Mr. Fowle: I would like, also, to urge this objection to this series of instructions: It seems to me that to give three or four or five instructions on the subject of price fixing places undue weight on the subject of price fixing, particularly in view of its late addition to the complaint, and to the statement

of counsel for the plaintiff that they don't claim it harmed anybody anyway.

Mr. Dixon: Counsel have made much of the fact that this complaint nowhere alleges any public injury.

I think it did to start with, but certainly this is public injury, if any public injury is required. And you have emphasized that point to an extent that I thought I had to emphasize the existence of it, or at least let the jury decide whether there was that type of thing in the case. Because it is illegal per se, and certainly that makes it a public injury.

The Court: Mr. Fowle's objection is overruled. However, I will read these all over together and see what the effect of them is.

Mr. Dixon: I think if we strike "scheme or plan," we [3577] should add the words "combination or."

The Court: All right. I have added that in. The objection is overruled. And I will read them all over to see if there are some that I can eliminate.

31 I went over, and the last part of it I think is wrong, "that you might consider such refusal as evidence of the existence * * *."

I think it has to be in connection with all the evidence in the case.

Maybe it is all right.

I revised 31 in those that I handed you. Let me see what you have got here, first.

What I objected to was, "you might consider such refusal as evidence of the existence of the combination and conspiracy."

The way it sounds is they may consider that evidence alone as evidence that the conspiracy and combination existed.

Mr. Dixon: I see your point.

The Court: If you look at 31 in the group that I handed you, it is about the fourth or fifth from the end, I don't think I made any changes, at least I told the girl not to, until she got down on the proposed instruction, to line 21, "agreements with Exchange Orange," and then appears, on line 22 in my proposed one,

"then you are entitled to consider these facts together with all the other evidence in the case [3578] in order to determine if the defendants and alleged coconspirators combined or conspired to violate the antitrust law and to determine if the defendants monopolized, attempted to monopolize * * *"

Mr. Dixon: I think, your Honor, if I may make this suggestion, that you have, of course, particularized a little more than I have. This instruction is based on the assumption, of course, that the court has previously advised them of the nature of the charges and the conspiracy which it claims was entered into in violation of Sections 1 and 2 of the Act. Therefore we end up with the application of it to that charge.

The Court: My objection, you see, was that it sounded as if this could be the evidence——

Mr. Dixon: I have no objection to the addition. I didn't intend it to have the effect that your Honor apparently thinks it has, or received from it, that this alone, without more, would be enough to con-

stitute a violation. We don't make that contention.

The Court: How about this? "as evidence bearing on the question of the existence or non-existence of the conspiracy," and so forth?

Mr. Dixon: I would suggest this, your Honor. On line 22, "you might consider such refusal along with the other evidence in the case." [3579]

The Court: I think you have got to go further. Not as evidence of the conspiracy, but as evidence bearing on the question of the existence or non-existence of the combination——

Mr. Dixon: That is essentially the same thing that I intended to say here, your Honor. You may have made it more clear.

The Court: I propose that the latter part read as follows, beginning about line 21:

"Silzle under their 1951 agreements with Exchange Orange, that you might consider such refusal along with the other evidence in the case as evidence bearing on the question of the existence or non-existence of the combination and conspiracy alleged by the plaintiff,"

and so forth.

Let's take you first, Mr. Dixon. Does that meet with your approval?

Mr. Dixon: That is all right, your Honor.

The Court: What are the defendants' objections?

Mr. Williams: I think, in the first place, the instruction is deficient in not stating that refusal to sell or refusal to give such arrangement may be justified if it is made for ordinary business reasons, and in that case it cannot be considered as any evi-

dence of the existence of a combination [3580] or conspiracy.

A combination and conspiracy can only be established by agreement. And it does not follow that if the plaintiff was unable to secure Valencia oranges from other sources, for reasons which are unexplained, that there was anything necessarily unlawful in the conduct of defendants, and that, therefore, the whole instruction should not be given, because their inability to obtain oranges from other sources must be attributed in some way to the defendants before it constitutes evidence of existence of a combination and conspiracy.

In other words, supposing that Winckler had been buying oranges 100 per cent from Morgan Ward for the past 20 years, and one year Morgan Ward doesn't like the color of his hair and refuses to sell to him, so he comes around to Sunkist; now, under this instruction this would say that that refusal of Sunkist to sell to him was evidence of a conspiracy.

It wouldn't be without some explanation of why he was unable to get oranges elsewhere.

The Court: It doesn't say that. It says in this particular set of facts you may consider such refusal as evidence bearing on the question.

Mr. Williams: It says, in line 16, "I charge you that if the plaintiff could not have secured California Valencia oranges from any other source"—our point is that any other source should be due to some act of the defendants. [3581]

Mr. Dixon: No, your Honor. This, again, illustrates the importance of the monopoly power over

the raw product. In other words, that is why I have closed the door here to the possibility of getting it from any other source. And the testimony shows there wasn't any other place they could get it. And that is the basis of an obligation.

Mr. Williams: If Morgan Ward didn't like the color of his hair and wouldn't sell to him, you can't consider that as being any evidence of conspiracy whatsoever.

The Court: It doesn't say that.

Mr. Williams: Now, we have other objections, also.

The Court: What are they?

Mr. Williams: The first one is the objection we made with respect to No. 5 relating to area of effective competition, and the market and the Florida juice, and we incorporate those objections here.

The Court: You may incorporate them.

Mr. Dixon: May I get the last part of the instruction? As I have it, the only additions were made after the word "evidence," "along with the other evidence in the case as bearing on the existence"——

The Court: No. "as evidence," then insert, "bearing on the question of the existence"——

Mr. Dixon: I see. "or non-existence of the combination and conspiracy alleged by the plaintiff to be in violation [3582] of Sections 1 and 2"?

The Court: Yes.

Now, what are the other objections, Mr. Williams?

Mr. Williams: There should be a specific intent to restrain interstate commerce alleged in connection

with the refusal before it can be considered as evidence of conspiracy.

I believe it also raises the Capper-Volstead question that we referred to in connection with the proposed Instruction No. 2, and we incorporate that objection, also.

The Court: All right.

What about this matter of a good business reason? Should that be in there, somewhere up about line 9, "Sunkist or Exchange Orange without a valid business reason refused to make"——

Mr. Dixon: I don't think it should be in here. I think if the defendants have in mind any charge on that, they should prepare one.

I would like to know what it is. That is why I had the one specifically submitted about a refusal to do business with the plaintiff in the early part of the entire series of requested instructions.

Mr. Fisher: Certainly it seems to me it should be in. Otherwise without some language it makes the refusal itself, regardless of the reasons for the refusal——

Mr. Dixon: Where you have monopoly power, and exercise [3583] it, the reason why you exercise it, or the motive with which you exercise it, is not material, if the effect of it is to restrain or eliminate competition then it doesn't make any difference how good your motives were.

The Court: Do you think it would be an erroneous statement of the law to insert on line 9 after "Exchange Orange" "without a good business reason"?

Mr. Dixon: Well, I would like to think about that, your Honor.

The Court: All right. [3584]

* * *

Wednesday, February 1, 1956—10 A.M.

(The following proceedings were had in the absence of the jury:)

The Court: The record will show the jury absent. Is there some problem you want to take up?

Mr. Strachan: Just a question about those two exhibits that we discussed yesterday, and on which your Honor reserved ruling. You suggested we might change the caption from "Grower Participation." Overnight I have talked with Mr. Finley and found that the term "grower participation" is one that is in common use in the industry, it was derived from Florida and has been in common use for many years. I expect him to define what "Grower Participation" means, and in light of that I would want to reoffer the exhibits in their present form with the understanding, of course, that instructions could be given on the subject if Finley's testimony weren't enough to identify the limitations, which I think it will be.

The Court: I don't think it ought to be on. Growers participate in everything that EOP does. That is what EOP operates for, that is what Sunkist operates for.

Mr. Strachan: But this is an instance in which the growers and the processors participate in the ultimate disposition of the fruit in the processed

form. It is a term that I think Mr. Dixon has used. He talked about [3589] participation contracts.

The Court: Finley may testify what term they use. If that is a term they use, that is one thing, but here you have an exhibit that concerns the two particular contracts that are really the guts of the plaintiffs' case, you bring an exhibit in and you want to characterize those contracts on the exhibit. All through the trial they have been talked about as the TreeSweet and Silzle contracts. Now, you want to call them Grower Participation contracts, because that, you say, is what they call them in the trade.

I don't think it is proper, and I will again sustain the objection. The objection, however, only goes to your characterization of it. You could use some other term.

You could take any number of examples. Supposing you had a case, just to give you an example of what I mean, supposing you had a case where a trucking company is being sued for negligence, and the trucking company had a particular number of drivers that they called their Careful Driver Unit. They might have called them their Careful Driver Unit forever, but when the case comes to the jury as to whether one of those drivers was negligent, do you think it would be proper to characterize him in an exhibit, that this was a truck driven by the Careful Driver Unit, when the very issue before the jury was: Was the driver negligent?

Mr. Strachan: I think clearly, on that hypothesis, it [3590] wouldn't be admissible, but I don't see

that that really bears a close analogy to what we are proposing here.

In your Honor's view, if we struck out "Grower" and just called it "Participation," would that tend to obviate the difficulty? [3591]

The Court: I am not going to take a lot of time on this. If you want to think about other terms, you may do so. I don't know that that answers it either. Take it up at some other time.

Mr. Strachan: All right. There is a little stipulation to correct the record. I don't think that we need to bother the jury with it. We can do it now.

Mr. Dixon: I think it can be handled right now.

Mr. Strachan: Transcript page 387 should be corrected at lines 9 and 10 by changing the figure there appearing as 32,007 to 7,622, and changing the figure which appears as 37,106 to read 15,330.

As to transcript page 38——

The Court: 38?

Mr. Strachan: Thank you. 388, line 10, where the figure appears 2,397,000, that figure should be made to read 5,400,000.

The Court: The corrections will be made. [3592]

* * *

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The record will show the jury present in their proper places.

Ladies and gentlemen of the jury, in your absence there has been received in evidence a series of exhibits, and for the purpose of the record—it won't

mean much to you now—I will read the exhibit numbers.

CS, CU, CV, CY, CZ, DC, DD, DF, DG, DH, DI, DJ, DL, DM, DN, DO, DQ, DR, DS, DU, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EN, EP, ES, and FD.

As to those exhibits, this first comment I have to make, the first instruction I give you, rather, concerns, for instance, DO. I will use this as an example. There may be others in there of like import. This is similar to other exhibits heretofore received which we spoke of as letters from brokers, where brokers wrote letters to Winckler & Smith complaining or stating something about the juice or the taste of it, or some complaint. Those brokers' letters are not received as any evidence of the facts contained therein, the truth or falsity of the facts. They are offered as impeachment of the witness Winckler. He gave certain testimony about what complaints he had and what complaints he had not. These are offered for impeachment purpose solely as to Winckler and [3593] not for the truth of the facts contained therein.

If it was to be proved that this juice was bitter or that something that was contained herein was true, then a witness would have to be brought before you to be examined and cross-examined on that subject matter.

This DO and any other exhibits in this list I read to you of similar character are admitted for impeachment purposes only and not for the truth of the facts contained therein.

Now, there is another series of exhibits, EJ, EK, EL——

The Clerk: EL is not admitted.

The Court: EJ, EK, EM, EP, and ES, which concern excerpts taken from minutes kept by the—are they all Exchange Orange?

Mr. Strachan: No. I think there may be some that are the executive committee.

The Court: Well, they are minutes of meetings of executive committees or board of directors—one of them speaks of a special executive committee meeting of Exchange Orange, another a meeting of joint executive committees of Exchange Orange and Lemon, board of directors of Sunkist, board of directors of California Fruit Growers Exchange, which became Sunkist—it is the same thing, board of directors of Orange Exchange. There is no argument about the fact that what is contained herein, as far as the retyping of it on these exhibits is concerned, is what appears in the minutes. But in these exhibits there will appear two kinds of things. One [3594] will be some action taken by a board or a committee, and the other type of thing will be some statement made by somebody who came before this group and made certain statements. [3595]

Now, the exhibits are not offered for the truth of the statements contained therein. They are admitted for the purpose of showing action taken and what was said may be considered by you solely for the purpose of understanding and interpreting what action was taken, but they are not offered for the truth of the facts contained therein.

That may seem difficult for you to follow, but let's take an example that may not even appear here. I will try to suppose one.

Supposing that some man came before one of these boards and said, "Last night there was a heavy frost and three-fourths of the orange groves in Southern California were frozen out, and I propose that certain action be taken." And then there would appear some action taken by one of these boards. They are in evidence to show what action was taken, and you can read what the man said as understanding what was presented to this board or committee when it took action. But it is not to be considered for the truth of the fact that three-fourths of the orange groves in Southern California were froze out in last night's frost.

Do you follow me on that?

You have to understand when an official board of directors or committee takes action, you are entitled to know what they had presented to them when they took action. But that doesn't necessarily mean that what the man said [3596] to them was true or false.

Do you follow me on that?

Therefore, these statements are not evidence of the facts contained therein, but may be considered in connection with the action taken by the official body of either of the defendants that may be involved in the particular minutes.

I think that covers this matter of exhibits. Is there anything further on this matter of exhibits?

Mr. Strachan: No, I don't believe so.

The Court: All right. Call your next witness.

Mr. Strachan: Mr. Robert Clark.

ROBERT VICTOR CLARK

called as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Strachan:

Q. What is your name?

A. Robert V. Clark.

Q. You were previously called as a witness in this cause and examined on direct examination by Mr. Dixon, is that correct? A. That is correct.

Q. You are the secretary-treasurer and general manager [3597] of E. A. Silzle Company?

A. That is correct.

Q. Are you appearing this morning pursuant to a subpoena served on you on behalf of the defendants? A. I am.

Q. Have you reviewed the invoices of Silzle sales of single-strength orange juice for the year 1951?

A. Yes, I have.

Q. Will you tell us what the price per case of 12/46 ounce Valencia orange juice was in April of 1951? A. It was $3.75 per case.

The Court: The witness is now talking about the price that Silzle sold it at?

Mr. Strachan: Yes, your Honor.

Q. Following that, the prices declined into the summer months, isn't that correct?

A. That is correct.

(Testimony of Robert Victor Clark.)

Q. What was the date of the first invoice for a sale made out of the state at a price of $2.20 per case or less? A. July 26th.

Q. What was the date of the first sales invoice showing a sale of orange juice in the 1951 season, out of the state, at less than $2.20?

A. Would you repeat that question, please?

Q. What was the date of the first sales invoice showing [3598] a sale of orange juice at an out of state price less than $2.20 per case?

A. Didn't I just previously answer that one?

Q. Did you have an invoice dated August 3, 1951, quoting a price of less than $2.20?

Mr. Dixon: If the court please, I object to counsel leading this witness. The records and invoices, if they have been subpoenaed, should be here in court to demonstrate the fact that this witness is testifying to, so we can know how many of them there are in this category, for example.

The Court: Well, this would save some time. Is this going to be lengthy, counsel?

Mr. Strachan: No, sir.

The Court: Overruled.

Q. (By Mr. Strachan): Isn't it a fact that on August 3, 1951, there was a sales price at $2.13½ per case? A. Yes, sir, that is right.

Mr. Dixon: If the court please, I object to that. It is leading the witness.

The Court: It is leading, and your objection is correct, but in an effort to save time I am overruling the objection.

(Testimony of Robert Victor Clark.)

Mr. Strachan: Your answer was "Yes," was it?

The Witness: Yes.

Mr. Strachan: That is all with this witness.

Mr. Dixon: I only have one or two questions, if the [3599] court please.

Cross-Examination

By Mr. Dixon:

Q. Mr. Clark, this August the 3rd sale that you testified to was made at what price?

A. $2.13½ per case.

Q. Was that after allowing for any discounts, swell allowance, and so forth?

A. That was before any allowances normal in the trade.

Q. Did you find any other invoices at $2.13?

A. There were other invoices in that same range. I can't say that I remember any at that same price.

Q. Do you recall to whom this sale was made at $2.13?

A. I believe it was the Nabob Food Company in Canada.

Q. Your testimony, though, that you gave here before, where I asked you the question, still stands, does it not, with reference to the price at which substantially all the sales made by Silzle from the juice processed under the Silzle-Exchange Orange contract in '51 took place—it still stands, does it?

A. I believe my testimony was that it was basically patterned the same, it was in the general price range.

(Testimony of Robert Victor Clark.)

Mr. Dixon: That is all.

The Court: The same as what? Basically the same as [3600] what?

The Witness: Well, the question he asked me.

Q. (By Mr. Dixon): I believe your testimony, when you were here and I was examining you with reference to the selling prices, was that selling prices by Silzle of the juice processed under the Exchange Orange contract were substantially the same as the Sunkist selling price, with some few exceptions to that price; is that correct?

A. There were some less and some more.

Mr. Dixon: Thank you.

Mr. Strachan: No further questions.

The Court: You haven't answered the question. Read the question and answer.

He answered part of your question and didn't answer the rest of it.

(The question and answer thereto were read by the reporter.) [3601]

Q. (By Mr. Dixon): You can answer that yes or no for the record.

A. I wish you would repeat that. I did not get one of the words in there.

Mr. Strachan: I don't think Mr. Dixon's question has been fair either. The witness has said sometimes the price is more and sometimes less, and that is identical to what he testified to on his first appearance here. Mr. Dixon, I think, is trying by a

(Testimony of Robert Victor Clark.)

summary statement to put a meaning on the prior testimony that it is not susceptible of.

The Court: The objection is overruled. This is cross-examination. There was an interruption when this was read, so I didn't get the answer. The witness now asks it be read again. Read the question. You answered part of it. You did not answer all of it.

(The question was reread.)

Q. (By Mr. Dixon): Now, will you answer my question?

The Court: The point is this. The question was first, were the sales substantially the same, and then the question also had the part with some up and some down. You answered the latter part, some more and some less.

Mr. Strachan: I will object to the first part, your Honor, on the ground it calls for a conclusion and is not based upon his prior testimony.

The Court: Overruled. This is [3602] cross-examination.

Q. (By Mr. Dixon): Do you understand my question, Mr. Clark?

A. Whether the price was substantially the same?

Q. I asked you whether that was your testimony when you were here before.

Mr. Strachan: I think that is improper. The record will show what his prior testimony was.

The Court: Overruled.

(Testimony of Robert Victor Clark.)

The Witness: Yes, I believe that was the testimony I gave.

Mr. Dixon: That's all. Thank you.

Redirect Examination

By Mr. Strachan:

Q. It is true, is it not, that the price at which Silzle corporation sold Valencia orange juice during the summer of 1951 was sometimes more and sometimes less than the Sunkist price?

A. That's right. [3603]

* * *

JAMES A. FINLEY

called as a witness on behalf of the defendants, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Strachan:

Q. What is your name?

A. James A. Finley.

Q. You previously were sworn and testified under adverse examination by Mr. Dixon in this cause, is that correct? A. I was.

Q. What is your occupation, Mr. Finley?

A. I am presently manager of Exchange Orange Products Company.

Q. How long have you been employed by the Orange Products Company?

(Testimony of James A. Finley.)

A. Since February of 1926.

Q. Prior to that employment, what was your education?

A. I graduated from Pomona College with a major in chemistry.

Q. When were you first employed by Orange Products Company and in what capacity?

A. I was employed in February, 1926, in the capacity of control chemist.

Q. Will you tell us briefly the history of your employment from that time down to the present?

A. First I was the control chemist. In those days we just had one chemist in the whole plant. It also involved some production work in co-operation with the superintendent.

Then in 1929 I was made plant superintendent. I was plant superintendent in charge of production, receipts of fruit, and shipping, everything that has to do with that, until 1946. Upon the retirement of the manager, I was made manager of Exchange Orange.

Q. Now, as manager of Orange Products Company, will you review briefly the duties and functions that you perform?

A. The duty of the manager is varied. It is more long range planning, making estimates of the ensuing crop, sales estimates of products, working with the sales department, making plans for the next year's crop, not so much the current crop, as being able to get rid of the fruit that is turned over to us, and making all those arrangements.

(Testimony of James A. Finley.)

Q. Now, what is the principal function performed by the Orange Products Company as a member of the Sunkist system?

A. Well, the Exchange Orange Products Company takes all the fruit that is left over from the Sunkist Growers after the fresh fruit is taken out, and any sales to outside processors, and then, why, the fruit is turned over to Exchange Orange. We have no control, we do not go out and say how much [3605] fruit we want. We take what fruit we get.

Q. And what is the purpose or the object of the Orange Products treatment of so-called by-product fruit that is turned over to it?

A. The treatment of the fruit itself?

Q. Why is the fruit turned over to the products company if it is not sold in fruit form?

A. It is a salvage operation primarily. The fruit is turned over to the Exchange Orange to salvage what money they can out of it. The growers have their money in the crop, and anything that we can get out is just that much to them. If it wasn't for the products plant, the same oranges would have to be dumped in the wash, as we call it, which was very common back before 1940. They are small sizes, scarred fruit, frosted fruit, that type of fruit that the fresh fruit market will not accept, and it has to have a home, and rather than run it into the dump, why, we process it.

Right at the start of it, we just took out the oil, which was the valuable product in those days, and

(Testimony of James A. Finley.)

then developed the juice business and the dried meal, until about 1940, when the war years came along and the Government took all of our fruit, and since then, with the days of frozen concentrate, there is a home for all the fruit. It has just been since then that we have really saved all the juice and all the peel from the fruit. [3606]

Q. Since the introduction and acceptance of the frozen concentrate? A. Yes.

Q. Will you tell us into what products Orange Products Company converts the fruit?

A. Well, we have a number of different products, but to simplify it, the orange, in the center of the orange, of course, you have your juice portion, and then your white portion and peel is what we call albedo, and the outer portion, the yellow portion, is the flavedo. We have the three portions.

The juice portion, we make different types juices. We make the concentrated juice, single-strength juice put up with heavy pulp, canned orange juice, frozen concentrate. Those juices can be made of different degrees of concentration. They can also be made with different pulp content.

And then when our customers want it, they want it with a different oil content, so you get a multiplicity of product. You can have about 200 juice products, but they all come from the center portion of the orange.

The white portion, the albedo, is where the pectin is obtained. That is what jells jellies and jams.

Then the oil is in the outer portion of the peel,

(Testimony of James A. Finley.)

the yellow portion. When you peel an orange, that yellow stain on your hand, the oil is what caused the yellow stain.

Now, we have those parts. We do not have enough sale [3607] for all the peel in the form of pectin, so the excess we run through a dryer where it is dried down to dryness, sacked, and sold as dairy or cattle feed in the same field with beet pulp and barley. It is feed for cattle.

Then recently, why, there is the pharmaceuticals, the bio-flavinoids, as we call them. That is a new development that has been occurring for the past 15 years, so we have that pharmaceutical field.

Q. What plant facilities does the Orange Products Company operate under your management?

A. The facilities of the Orange Products, we have the main plant at Ontario, and then we have a branch plant at Lindsay, California. That is just the other side of Bakersfield in the citrus area called Central California.

Then we have a plant at Tempe, Arizona, right out of Phoenix. That is primarily a grapefruit plant just for canned juice, canned grapefruit juice, although we do have some oranges, and we make a blend.

Those three plants are under my supervision.

Q. Is the Orange Products Company operated for the purpose of gain or profit to the corporation?

A. There is no profit to the Exchange Orange Products Company. Juice returns go back to the

(Testimony of James A. Finley.)

grower. Exchange Orange Products does not pay dividends or make any profit at all. [3608]

Q. That is, you receive the fruit, you arrange for processing of it and disposing of it, and pay the cost of processing and disposing of it, and if there is anything left that is returned to the contributing growers, is that correct?

A. That's right, on a per-ton or per-solids basis, depending upon the fruit they send in. If they do not send fruit in, they do not get returns.

Q. Has the Orange Products Company ever paid any dividends to its stockholders?

A. No, it never has.

Q. Does it restrict itself to handling fruit of members of the Sunkist Growers organization?

A. The members only. We do not handle anybody else's fruit.

The Court: You said it paid dividends to its stockholders. You don't really have stockholders, do you?

The Witness: You have revolving fund stock. That is, the stockholders——

The Court: Well, you don't have stockholders in the sense of a profit corporation.

The Witness: As a private corporation, no. It is a revolving fund so that the current growers hold the stock in it, but it is what we call revolving fund stock.

The Court: Actually, it is returned pro rata to the [3609] growers to the extent that they participate.

(Testimony of James A. Finley.)

The Witness: To the extent that they participate, quality of fruit taken into consideration.

The Court: All right.

Q. (By Mr. Strachan): Will you describe the annual harvesting of crops for different kinds of fruit that are to be processed, if not sold as fruit, through the products organization? Take the yearly cycle.

A. Well, we have got the different areas. Starting in with the navels, the navels from Central California, that is between Bakersfield and Fresno, start in between the 15th and 20th of November, and they try to get those harvested by, oh, the first of February.

The Southern California navels start during the first and the 15th of January, and they are harvested and are through, oh, the first two weeks of May, depending upon the size of the crop.

Then the Central California Valencias start in in April, and they don't have too many up there, so it is about a six-weeks season, so it goes in April and the early part of May.

Then the Southern California Valencias start, which is the major crop as far as products are concerned. It starts about the middle of May and goes to about the, oh, the first or the middle of November, depending upon the size of the [3610] crop.

Then we have, well, there are some miscellaneous varieties, as we call them, not very much volume, that come in the spring of the year.

(Testimony of James A. Finley.)

There is the grapefruit, what we call desert grapefruit, that is Coachella Valley, Imperial Valley, and the Phoenix area. That fruit comes on starting about December and going over to the middle of June. [3611]

Then we have the summer grapefruit, which is through this area, that comes on about the middle of June and goes through about the middle of September. It might be of interest that all those blossom at the same time. It just takes longer to make an orange.

Q. (By Mr. Strachan): Will you tell us how that annual rotation of crops fits into the crop season of Florida?

A. The Florida season, they break it down to what they call their early season, mid season, and Valencias.

Their early season Valencias start in about the middle of October, it goes over to some time in January, middle of January.

The mid season, around the first of January, and it goes to about the middle of February, first of March.

Then the Valencias start about the first of March and they are through sometime anywhere from the first of June to the third week in June.

Their grapefruit follows about the same pattern, starting in October and finishing in June.

Q. Will you tell us what your regular procedure is for studying in advance the crop prospects and

(Testimony of James A. Finley.)

the market conditions which will face you during a Valencia packing season?

A. Well, we can tell or get a guess, not in cars or boxes, but we can tell along in August, September, whether it is going to be a large crop coming up, starting in the [3612] next May and June, or a small crop, or an average crop. That is, if we don't have a freeze in January. So that gives us some indication. We watch that, and then about October or November the government estimates come out about the growing conditions of the crop, that gives a better estimate. We start making pretty close plans then in case we haven't got enough facilities, or if it is a short crop we start making plans on how to distribute the juice to our customers.

We get a pretty good estimate then of the number of cars, boxes of fruit, after January and February. We have to wait until after that, because those are the two months we have the danger of frosts.

As soon as we get that—I say "we," that is Mr. Wilcox of the Sunkist Growers gets that estimate from the Government and they figure then about the number of cars that can be sold fresh.

That estimate also takes into account the size of fruit, that is, projected size of fruit. They take monthly measurements and compare the growth this month, compared to last year the same month, and a five-year average, so they make a pretty close estimate of the size of the fruit in the summer

(Testimony of James A. Finley.)

months. From that they estimate how many tons then will be turned over to products plants. [3613]

Q. And do those studies and statistics relate only to California crop and market conditions, or do they also include the Florida crop and market conditions?

A. Well, the estimate of the amount of Valencias going to products is pretty well set, but the products that we figure on making, the products it goes into, is determined to a large extent upon the Florida crop.

Q. What studies do you make of the Florida conditions?

A. Well, I go down to Florida about three times a year. Usually in the latter part of November, at the beginning of their season; I also go down in February, just about the peak of their season before the Valencias, and at that time they have a pretty good estimate on their crop for that year; and then I go down again in June at the end of their season to see how they came out, and also to see what kind of a set they have got for the following year.

Q. When do you start making plans and determinations for allocating the fruit which you expect to be available between the various classes of citrus products? A. Of citrus products?

Q. Yes.

A. Usually after February and after I take the trip to Florida, I determine whether they are packing an excessive amount of single-strength juice or

(Testimony of James A. Finley.)

frozen concentrate, because those are primarily the only two products they make [3614] in Florida; and if I think that they are, you know, short on frozen concentrate, I will make plans to pack more frozen concentrate here during the summer; if they are long on single-strength juice, less. Or if it looks like they are not overpacking on single-strength juice, and the market will be maintained, I plan on putting up more single-strength juice. It depends on their finished pack.

I make the plans so that we are flexible, because we don't pack those two items until starting about the 1st of July.

Q. When did you commence making your estimates and your tentative plans with respect to the Valencia season for the summer of 1951?

A. Well, that was the winter of 1950, November and December of 1950, we knew we had a large crop coming up and we were discussing it, then we waited on any final decisions, I think, until after the cold weather was over. But we had definite plans in November and December, because we knew it was a large crop and small sizes.

Q. When did you begin to make a determination as to what classes of juice products you would allocate the available fruit to?

A. It was about that same time. The frozen concentrate business was a growing business. They just started three or four years before that, and the consumers accepted it, and [3615] the purchases were greater than what Florida was pro-

(Testimony of James A. Finley.)

ducing or ourselves. We knew from the Florida estimates, which we could get in November and December, because they make an estimate on the number of gallons that they are going to pack, by taking the gallons moving out of warehouses, and the way the consumers were taking it, we knew there would be a shortage of Valencias, so that determined our thinking that we should put up as much frozen concentrate as possible.

Q. Did you also determine that there should be some production of hot concentrate?

A. Yes. Hot concentrate is an item that goes to the beverage trade. It is a pretty steady market. That is, it is about the same number of tons that goes into that market a year. It will vary, oh, five, ten per cent up or down, depending on whether we have a warm summer or a cold summer. That is a beverage. So that product is more or less what we call a stable product that we can depend upon year in and year out taking the tonnage.

And it will also take the early season fruit, that is May, June, even late navels with a high acid, because there is also more acid added to the product, so it really doesn't make any difference there. So we can tell a year or two ahead of time pretty near how much hot concentrate we will make, that is within ten, fifteen per cent.

Q. Then you made your plans to provide for an [3616] allocation of the necessary fruit for hot concentrate as one of the first items to be produced, is that correct?

(Testimony of James A. Finley.)

A. That is the first item to study.

Q. What can you say of the return that hot concentrate production will yield for the growers?

A. Well, the hot concentrate return is, I would say, a good average return; that is, that product goes into a five-cent carbonated beverage, or five or ten-cent drink now, but what they can afford to pay for it is a pretty constant figure, while these other products, they will go up or down. Frozen concentrate may be high one year and low the next, so it could be higher or lower. Taken over a period of years, five years, we feel that the hot concentrate will average as well, if not better, than the other products, and it will also take the early season fruit, which frozen concentrate and single-strength juice will not take.

Q. The Orange Products Company has facilities, has it, for making hot concentrate which it sells to the trade?

A. Yes, we have facilities for the so-called hot concentrate.

I might say the hot temperature is boiled down, it is 105 to 110, so it really isn't hot, but it usually is a pasteurized product. We have the facilities to make that. We make bases out of it for our own label, for customer label, according to their specifications. They will give us [3617] their formulas and we will make it. We also sell that concentrate in 50-gallon cans to supply houses that buy the straight concentrate and then they add the citric acid and oils and put it up in the finished container.

(Testimony of James A. Finley.)

Q. There are facilities for the production of hot concentrate in California other than those that are owned by Orange Products Company, is that correct? A. Yes, there are.

Q. Mention some of the plants that in the year 1951 had such facilities.

A. Mission Dry Corporation had facilities for hot concentrate. They turn out the Mission beverage. Hyland-Stanford had facilities, and they sell under the name of Tru-ade. Bireley's had facilities for hot concentrate, as well as frozen. Nesbitt, that is Nesbitt Fruit Products Company, had facilities for hot concentrate. Mutual Orange Distributors at Anaheim had equipment for hot concentrate. Winckler & Smith had some facilities for hot concentrate. Paramount, up in San Fernando, had facilities. I think they could make either hot or cold. Ventura Processors up in Ventura, they had facilities.

That is all I can think of now.

Q. In anticipation of the Valencia season of 1951, you said you determined that policy should be to pack a maximum volume or quantity of frozen concentrate, is that [3618] correct?

A. That is correct.

Q. What was the policy that you determined on with respect to the amount of single-strength juice that you desired to have packed during the coming season of 1951?

A. Well, any fruit over and above what we would need for the hot concentrate, frozen concen-

(Testimony of James A. Finley.)

trate, we decided to put into single-strength juice, because we didn't have enough facilities for the frozen concentrate, and the single-strength juice being the lowest priced item—the frozen concentrate at that time was selling for about $2.11 a dozen ex-warehouse, which would reflect $40, $45 a ton, so it was obvious that we would make all of our effort to put in the product into the frozen concentrate. In addition, we bought a third vacuum pan, particularly, for that purpose.

Q. Were you able, with the facilities that were owned by Orange Products Company, to keep your single-strength production at its maximum while you were also producing the maximum quantity of frozen concentrate?

A. No, we weren't. We had the juice room to get through the maximum amount of fruit. We added a third vacuum pan, which threw us out of balance, which permitted us to take more juice to the vacuum pans and less to single strength, so we ran the vacuum pans to capacity, then any surplus juice over and above what the vacuum pans would take would go into [3619] single strength. Or when we cleaned up the vacuum pans. You have to have cleanup, so you would boil them out and sterilize them, then we could run single strength at that time. But it was just a surplus deal. [3620]

Q. That is, the production of single strength was only a surplus deal?

A. It was only surplus.

(Testimony of James A. Finley.)

Q. As far as your own facilities were concerned?

A. We knew we had enough. We wanted some single strength, because if you have got a label on the market you want to keep the label alive, but you don't want to push it. So you want some, but you don't want to push it.

Q. What labels were there under which California single-strength juice was being marketed on a national scale at that time?

A. Well, in the case of our own, we had the Exchange label, which we marketed nationally, and then for the first time we used "Sunkist" on the can. So we figured on going nationally with the name "Sunkist" as being our first label, and our "Exchange" the second label. With the short pack, we didn't get very far nationally. We did ship some out of the state, but very little.

Then there was the TreeSweet label, which was an old label. In started in 1937 or so. That was an accepted label nationally, and had the name "California" on it.

Case-Swayne, I think, is mostly just local.

Winckler, I think, sold nationally before that.

Silzle was more of a private-label packer. I think they did have their own label, but they gave that up before 1951. [3621]

And the Mutual Orange Distributors sold some single-strength juice under the "Real Gold" label, and they sold that nationally. But they put in equipment for frozen concentrate, and they con-

(Testimony of James A. Finley.)

centrated their efforts on frozen, and I don't know whether they went nationally in '51 with the Real Gold, or not. They had previously.

Q. It is a fact, isn't it, that the TreeSweet label in 1951 was a better known and a more productive label than any other in the United States, of California juice? [3622]

* * *

The Witness: Yes. It was the most popular California juice label in the United States, due to their active sales and production over the great number of years. They had a very good sales force organized, and they also turned out grapefruit juice under that label. They had a pretty [3625] well-rounded business.

Q. (By Mr. Strachan): Now, can you refer to any statistics to indicate to the jury the growing importance of the frozen concentrate form and the relative decline in the importance of single-strength juice down to and through the 1951 season?

A. Well, I have some figures here. The growth of frozen concentrate nationally was phenomenal at that time. To go back to what I consider the first year of frozen concentrate, the two previous years being more or less experimental, the first year was 1948, 2,300,000 gallons. I am leaving off the odd figures.

1948-49 ran about 12,200,000.

1949-50 ran 25,000,000.

1950-51 ran 35,000,000.

Today it is around 65,000,000.

(Testimony of James A. Finley.)

So the growth right during that time was the time of the major growth, in Florida as well as in California.

Q. You reported, did you not, during September that in your opinion it was an important policy matter to keep some California single-strength juice on the market even though the return did not yield as much to the growers as did the frozen concentrate?

Mr. Dixon: Now, if the court please, it seems to me that question is certainly not proper. [3626]

The Court: Overruled.

The Witness: Yes. As the fruit dropped off, our estimate of fruit that year——

The Court: We will save time if you will answer the question.

The Witness: Yes. I reported to the board to that effect.

Q. (By Mr. Strachan): Now, you say that the $40 price that was posted as the sales price of products oranges by Mr. Kelly was fixed so that hot concentrators could afford to pay that price and operate profitably, is that correct?

A. I don't know how he fixed the price, because I was not in on that, but the hot concentrators could afford to pay that price, yes.

Q. How about the frozen concentrators?

A. They could afford to pay that price, if not higher.

Mr. Dixon: If the court please, it seems to me, your Honor, that this is clearly a conclusion of this

(Testimony of James A. Finley.)

witness without any basic facts or evidence to support it, that these processors could pay it. It is hearsay unless this witness can testify of his own knowledge.

The Court: Overruled. I think the witness with his background and experience is qualified. This is opinion testimony.

Q. (By Mr. Strachan): Will you tell the jury upon [3627] what your testimony to that effect is based?

A. It is based on the hot concentrate which we made and our sales price. We knew they could afford to pay it. And, also, that the hot concentrators were willing to and did buy their supplies that year at $40 a ton.

Q. Did the frozen concentrators also buy?

A. The frozen concentrators that made it, what they bought from Sunkist, they paid that. I don't know what they paid other producers of fruit.

Q. When you decided to use EOP facilities for the production of hot concentrate and frozen concentrate up to the full capacity of those facilities, did you have enough capacity then arranged for, or did you have enough capacity to process all of the products oranges that you expected would be sent to you? A. No, we didn't.

Q. Will you tell us what steps you took to make other processing facilities available for the handling of this excess of products fruit?

A. Well, I contacted some other processors of single-strength juice.

(Testimony of James A. Finley.)

Q. What about hot concentrate first? Did you make any arrangements?

A. I made arrangements with the hot concentrators which were customers of Sunkist or we had previous arrangements with [3628] to run hot concentrate for our account when their plant was being shut down, because they just buy so many tons and quit. So I made arrangements when they were through that we would take over.

Q. With whom did you make that sort of arrangement?

A. We made arrangements with Mission, Hyland Stanford, and Bireley's.

Q. And were those arrangements simply to process as a contractor and deliver the product to you upon payment by you of the processing cost?

A. Yes. We furnished the fruit, they charged so much a gallon for making the concentrate, which is custom packing, and we took the concentrate off their hands.

Mr. Dixon: If the court please, may I just register an objection for the record at this point? We have specific contracts here which can speak for themselves.

The Court: The contracts speak for themselves, but this is merely a summary of reference to these contracts. The jury will look to the contracts that are in evidence in the matter. You may proceed.

Q. (By Mr. Strachan): When did you first start making these custom packing arrangements with Mission Dry?

(Testimony of James A. Finley.)

A. The first contract we had with them was in 1947.

Q. Did you have contracts in each of the succeeding years with Mission Dry down to and including 1951? [3629]

A. Yes. I think every year without exception we had some working arrangement with them and they did some custom packing.

Q. Now, will you tell us briefly the history of your custom packing arrangements with Hyland Stanford?

A. Well, they were also customers of Sunkist on fruit, and when they got through running that, they usually ran early season fruit, they were through for the rest of the year. If they had additional capacity, and we could use it, instead of us putting in vacuum pans to run it, we would hire them at cost plus a little profit to run for our account.

Q. For how many years did that sort of an arrangement operate between Orange Products Company and Hyland Stanford?

A. Oh, that started back in 1946, 1947, 1948, too.

Q. Were the arrangements any different or the reasons which you had for arranging these custom packing contracts any different in 1951 than they had been in the prior years?

A. No, they weren't.

Q. You also had a custom packing arrangement with Bireley's division of General Foods, did you not? A. Yes, we did.

(Testimony of James A. Finley.)

Q. Will you tell us briefly the nature of that arrangement? A. You mean in 1951?

Q. Yes. [3630]

A. We had a previous one before that. But in 1951, knowing that they had hot concentrate capacity and frozen, we made an agreement with them that when they got through running what they needed for their own account, they would run hot concentrate for us until the fruit was mature enough that we figured it would go into frozen, and then they ran frozen concentrate under our label. We paid them so much a dozen. We furnished the fruit and took the merchandise off their hands.

Q. For how many years had you had an arrangement with Bireley's for custom packing of hot concentrate?

A. We had an arrangement shortly after the war, 1946, 1947, in there, and then there was two or three years we didn't have one, but they bought mostly Sunkist fruit. We didn't need them in those war years. We had enough capacity lined up. When we saw we were going to have more fruit in 1951, why, I approached them.

Q. Did you have any reasons or intentions when you entered into the contract with Bireley's for the 1951 season for entering into that arrangement that year, other or different reasons or intents than you entertained when you contracted with Mission Dry and Hyland Stanford? A. No, there wasn't.

Q. Now, you have mentioned that you entered into a contract with Bireley's for frozen concen-

(Testimony of James A. Finley.)

trate in 1951. Was [3631] that frozen concentrate to be packed under their name or under the Sunkist brand?

A. It was packed under the Sunkist brand.

Q. That was strictly what you call a custom packing arrangement, where you paid the manufacturing cost plus a profit for manufacturing?

A. What I call a manufacturing profit.

Q. Now, will you tell us what other arrangements you made or efforts you made to arrange for additional frozen capacity?

A. Well, there was the Covina division of Exchange Lemon Products Company, which is a Sunkist organization. It is commonly known as Damerel-Allison. Exchange Lemon bought them just about that time, the year previous, for lemon products. We contacted the Exchange Lemon to see if they would have facilities available for frozen product, which we knew they had, because they produced, Damerel-Allison had already produced it under their own label.

Then there was next a company by the name of Cold Gold contacted me and said they had lost their contract with Snow Crop in the previous year and wondered if we could use their facilities. That contract never went through because of quality of merchandise. [3632]

Q. Did you ship fruit to them and make a trial run to see whether the Sunkist specifications could be met?

A. We shipped three or four loads of fruit to

(Testimony of James A. Finley.)

them and sent men down there to help them, and their equipment was such that it was just going to cost too much to fix it up to make it, so they gave up.

Q. What other efforts did you make to arrange for frozen concentrate?

A. Well, then there was Harts, located at Brea, who contacted me through a broker to see if we wouldn't use their facilities that year, and we made a test run there, and they were able to make a satisfactory product, and we went ahead with a contract with them until we ran short of fruit.

Q. Going back a little bit, at what time of year was it that you contacted Mission Dry, Hyland Stanford, and Bireley's with respect to the hot concentrate?

A. Contacted Mission and Hyland Stanford, it was in March of '51; and then it was the early part of April that I contacted the manager of Bireley's.

Q. When was it that you had your discussions with Cold Gold that you have just described?

A. Cold Gold contacted someone in the Sunkist organization, either Mr. Wilcox or Mr. Armstrong, and said the facilities were available, and they passed the word on to me, and that was the early part of June, I think it was. I don't [3633] remember the date.

Q. When was it that you had your discussion with Harts Foods?

A. Harts came along about the middle of June, about that same time. I was approached through a

(Testimony of James A. Finley.)

broker that came to see me, that the Harts organization was changing hands right then, and wanted to introduce me to the new owner. And it was about the middle of June by the time I really contacted the owner. The contact was through the brokers before that.

Q. The arrangement that you worked out with Harts Foods, again, was an arrangement to have the merchandise packed for Orange Products Company's account under your label?

A. Yes, it was, under the Sunkist label.

Q. That was the arrangement also made with the Damerel-Allison Company?

A. Yes, that is all under the Sunkist label.

Q. What other contacts did you make in an effort to secure additional frozen concentrate capacity?

A. As the fruit was getting more mature, I contacted—I heard where Mutual Citrus Products Company organization at Anaheim, that they were through running lemon, so I contacted them to see if I could use their facilities the balance of the year; it was about the middle of July, the [3634] season was well along. I talked to them, gave them in terms about what the price would be. I went over their equipment to see whether it would be satisfactory to make the product and decided it was, and we decided to make a test run of the products, so I sent cans down to them.

Q. That was about what time of the summer?

A. The latter part of July. It was about the

(Testimony of James A. Finley.)

middle of July I made the contact, and sent cans down the latter part of July.

Q. All of the arrangements that you described up to the present are these custom-packing arrangements with the product packed for EOP or Orange Products Company's account; is that correct?

A. That is correct.

Q. Now, you also had arrangements with Hyland Stanford and Mission Dry which were called deferred-payment arrangements; will you describe those to the jury?

A. Well, the deferred-payment contracts, they bought the fruit from Sunkist at the going market price, put up the concentrate in barrels, and it was put into Lawrence warehouse, and then as they took the merchandise out of storage they paid for the concentrate coming out on a formula basis as to how much they paid for the fruit. That is, the Sunkist organization put up the fruit and got paid for it later as they took it out, and the concentrate was the security of the [3635] growers.

Q. Under those so-called deferred-payment arrangements the fruit is bought and the product is owned in these cases by Hyland Stanford or by Mission Dry; is that correct?

A. Yes, they own the concentrate, oil, and peel, the whole orange. It is a straight arrangement, and with just an arrangement for payment of the fruit.

Q. Now, will you tell us what arrangements you undertook to make for the production of single-strength juice during the summer of 1951?

(Testimony of James A. Finley.)

A. Well, shortly after that March period I was talking to all of them, probably about March or April, because we had previous contracts with Tree-Sweet since '47, it just took about a telephone conversation, and I told him or asked him if he wanted an arrangement, similar to the ones we had previously, for that summer. And as I remember it, he said he did. And he left for Florida, because they have a branch plant in Florida. Then later, we didn't start up until July sometime, we worked out the final detail, and the only detail on that one was just a change of figures, because of increased cost of cans, cases, and so forth, and any other minor adjustments.

Q. Basically, the contract and the operating arrangement that you worked out with TreeSweet was the same as those that had been in effect for prior years since 1947, is that [3636] correct?

A. Yes, since 1947, basically they were the same. [3637]

Q. Will you explain the circumstances under which the first TreeSweet agreement of this type was worked out in 1947, and explain your reasons for working out this arrangement?

A. It was in 1947 TreeSweet was buying the fruit, canning the product. Along about September, after he had enough packed, which he figured that he could sell at the then going price, usually about September we get preliminary estimates or feelings from Florida what their opening prices are going to be on single-strength juice in October and Novem-

(Testimony of James A. Finley.)

ber, and he did not want to pack for inventory, so in his discussions with Sam Kelly, the party whom he bought the fruit from, he told him he was going to have to shut down; there was a lot of fruit then, and Sam Kelly——

The Court: Were you present at this conversation?

The Witness: No, I was not, but I got it from Sam Kelly, as telling me why to go ahead with the deal.

Mr. Dixon: Your Honor, I made no objections to this general line of questioning, but I certainly think I must object to any hearsay testimony.

I object to the answer on that basis.

The Court: I am going to overrule it to save time.

It is admissible without respect to the truth of the content, to show why the witness did what he did.

Overruled. Go ahead. [3638]

The Witness: So with the threat of shutting down, Kelly contacted Armstrong or Wilcox, and in turn relayed the information on to me, to see if there was some kind of arrangement that could be made to keep them in operation.

Q. (By Mr. Strachan): What was the growers' interest in keeping them in operation if the fruit was not going to be sold?

Mr. Dixon: If the court please, I don't want to object to leading questions, but it seems to me there ought to be some limit placed upon these questions and answers. Counsel is certainly able to ask ques-

(Testimony of James A. Finley.)

tions here that will elicit facts and not conclusions. It is a question for the jury, many of these questions. I think it is time, in this examination, that counsel confine himself to the question and answer method.

The Court: I will sustain the objection.

You may inquire why he did what he did and so forth.

Q. (By Mr. Strachan): All right.

You did, then, meet with the TreeSweet representative, is that correct?

A. I met with Mr. McCracken, president of TreeSweet.

Q. You worked out an arrangement under which, in substance, what was to be done by you and what was to be done by TreeSweet——

A. Worked out an arrangement whereby he would pack [3639] the juice at cost, then the product as it was being sold, depending upon the price being sold, if it was higher than the current price it was all right, but worked out an agreement where he would pack for the account of the EOP Company at cost, and then with our type of organization, because the EOP organization doesn't sell anything, it was sold through the Sunkist Products Department to TreeSweet at the then current price of Sunkist, with allowances for brokerage, cash discount, and some of his sales expenses. In the original cost there is no sales expense. So it is what you call —TreeSweet would p... it, then the growers and TreeSweet would participate in the returns at the

(Testimony of James A. Finley.)

current price. A grower participation plan with the processor.

Q. Will you tell us whether this term "grower participation contract" is a phrase that is in common use in the industry, not only in California but in Florida?

A. In Florida is where it is mostly used, I think. In California there is not enough processors to use it, although it is used in California. But I think the term originally originated in Florida. It is common down there.

Q. Will you tell us why, with the growers' interests in mind, you entered into this sort of an arrangement with TreeSweet in 1947?

A. They had the production facilities to do the job, as well as we had. If we didn't want to use their [3640] facilities we would have to have added more ourselves, that would have taken more capital. They had a sales organization that could move the merchandise.

With our type of operation, with no control over the amount of fruit coming in, the ups and downs, we have sales problems, and with a large crop that year, why, we used his sales organization, as well as his production facilities.

Q. Had you not worked out this sort of a participation arrangement, what would have become of the fruit and what would the effect have been on the growers whose fruit was shipped?

Mr. Dixon: If the court please, I certainly must

(Testimony of James A. Finley.)

object to that. That is obviously a conclusion of this witness.

There were plenty of other processors that were available, and so forth. For this witness to testify as to what would have happened to this fruit seems to me is clearly—if he testified that if he didn't have this deal he would have dumped it, that is all right.

The Court: There is no issue on this point, but maybe it will save time to overrule the objection. But the issue is not that this kind of a contract was not good, ultimately, for the growers. That is not the issue in the case. Everybody concedes that. We are just spending time on an issue here. [3641]

To save time I will overrule the objection, and let's go ahead.

Do you remember the question?

The Witness: What would happen to that fruit if we hadn't made that arrangement?

There are a number of things that could have happened to it, to come back that far.

One is that we could put up more hot concentrate, which would have given us an excessive stock to carry over into the ensuing year. Another, if we would have had the canning capacity ourselves, we could have canned it and put it in the market ourselves. And the third, we could have made a grower participation plan with other processors, because I don't think any others would have gambled any more than we would have. The fourth is it would have been dumped in the wash, no salvage value at all.

(Testimony of James A. Finley.)

Q. (By Mr. Strachan): Then this grower participation arrangement that you first worked out in 1947 was one that was intended as a means of further salvaging the orange crop for the growers, is that correct?

A. It was a further means of salvaging the grower crop for the growers, without the orange growers putting in a large capital investment. [3642]

Q. Now, did you at any time enter into one of these grower participation arrangements with any intent or any purpose other than the intent and purpose with which you entered into this first one which you have just described?

A. No. That was the sole intent.

Q. Did you ever enter into one of these grower participation contracts for the purpose of injuring any independent or private processor in the citrus industry? A. I never did.

Q. Getting back to the 1951 year, can you recall approximately when it was that production was commenced by TreeSweet under this participation arrangement? A. In 1951?

Q. Yes, sir.

A. It was the latter part of July.

Q. Can you fix approximately when in July?

A. I would say it was the last two weeks in July. It started up slow. They watch quality pretty close, and as you get the fruit at that time, some loads may be good and some a little tart. So they do pretty selective picking from certain packing houses in certain areas, and they usually start in early in the

(Testimony of James A. Finley.)

Redlands area, that being warmer. So that they start in pretty slow, and by the first of August they are going pretty good, full swing.

Q. In addition to having renewed your working arrangement [3643] with TreeSweet in the year 1951, what other steps did you take to obtain processing capacity on one of these grower participation arrangements with respect to single-strength juice?

A. About that same time in August, I contacted——

Q. In August?

A. In April. I contacted Case-Swayne. I contacted Paul Case of Case-Swayne, he had been customers of Sunkist for a number of years, and told him about the arrangements which we had with TreeSweet the previous years, and went over in a general way how it worked out, that we would pay him his cost and he would buy it back and we would give him these discounts, and wondered if he wanted to go into an arrangement like that.

He said that he would talk it over down back at the plant and let me know, and he let me know in about a week and said that they thought they would be just as well off if they didn't have it.

I just told him, "Well, if you need it, let me know."

Q. Had you before 1951 ever had any processing arrangements with the Case-Swayne Company?

A. We had a small one in 1950. We were running pretty heavy on a Government order of orange juice, I think it was——

(Testimony of James A. Finley.)

The Court: You have answered the question.

The Witness: Yes, we had. [3644]

Q. Will you tell us what that prior processing arrangement had been?

A. We needed a little bit of blend to fill a Government order. Our equipment was going to capacity. So I just telephoned to him and asked him if he would run so many thousand cases of blend for us if we furnished the fruit, cans and cases, and take the merchandise off his hands.

He said he would, and he did that. It just lasted a couple of weeks.

Q. Was the product that they produced satisfactory with respect to quality?

A. Yes, it was.

Q. Was the entire dealing satisfactory from your point of view? A. Yes, very nice dealing.

Q. Will you tell us what other arrangements you made to secure participation contracts with respect to single strength juice?

A. I contacted Mrs. Silzle, who was the operating head of the Silzle corporation.

Q. About when was that?

A. That was after the middle of June. That was between the middle of June and the first of July. She had been out of the state and I had to wait until then to contact her. We went over first the general terms of the contract, and she [3645] was willing and wanted a contract.

Q. When you negotiated the TreeSweet and the Silzle contracts, how did you arrive at the allow-

(Testimony of James A. Finley.)

ance to be made to the processor for manufacturing?

A. Well, we knew what our own costs were. That is, you don't get a discount, volume discount on cans, you know that, cases, and you pretty well know your own costs. In the case of TreeSweet, I had our controller, Mr. Smith, and their controller go over their cost to satisfy us that that was a reasonable cost figure. We were satisfied that was the cost, and I think they were, although lots of times costs are in the books.

Q. One of the basic elements of these participating contracts was that the processor should be paid cost and only cost for manufacturing, is that correct?

A. Yes, that is correct, on the manufacturing end of it, only cost.

Q. There was to be no profit made on the manufacturing as such?

A. Not on what he sold under his own label or his own buyers' label.

Q. The arrangement with TreeSweet was different, was it not, from the Silzle arrangement, in that Tree Sweet was to pack under its own label?

A. Yes, sir. It was to pack the majority of its product [3646] under its own label, although it did have some private label business, and they could still take private label. It didn't restrict them to the Tree Sweet label.

Q. Will you explain in what other respects the Silzle and TreeSweet contracts differed?

(Testimony of James A. Finley.)

A. Well, the TreeSweet contract was patterned for the TreeSweet label, while the Silzle contract was patterned more for a private label type of business. The TreeSweet was to carry an inventory over the winter, while the Silzle was more or less to cover what they sold currently, and not to pack any large amount for inventory. That is, they would make the sales and then run the product.

Q. Will you explain what reasons you had for arranging to have TreeSweet pack for inventory, whereas you did not arrange to have Silzle pack for inventory?

A. Well, I knew the type of sales organization with your own label and the California label, which we were primarily interested in, that would go in the TreeSweet label, while with private label, you may get a Florida label on it one time and California the next. So I felt that it was better for the California citrus industry to have the California high quality label on it.

Q. Do you know to what extent the public acceptance of TreeSweet products exceeded the public acceptance of the Sunkist or Exchange products in 1951? [3547]

A. Well, I always figured that TreeSweet was about a 600,000 case organization under the TreeSweet label, and Exchange was about a 400,000 case. It was the year 1951, and we didn't turn out any Sunkist at all until August of that year, so we had to feel our way along to see how acceptable the Sunkist label would be. We didn't know in August how acceptable it would be, because that

(Testimony of James A. Finley.)

was our first year that we were getting ready to build it.

Q. In view of the sales potential which the TreeSweet organization had and their national reputation, would you say that there was any other California processor, other than TreeSweet, with whom you would have been willing to make the same sort of a participation contract as the one that you made with TreeSweet?

A. No, I wouldn't have made the same type contract with anyone.

Mr. Dixon: I did not get the answer.

The Witness: I wouldn't have made the same type of contract with any other single strength canner.

Mr. Dixon: You would have made?

The Witness: I would not have made.

Q. (By Mr. Strachan): Now, at the time you had concluded making these various arrangements for the processing of Valencias in 1951, what was the total capacity which you thought you had arranged for in tonnage? [3648]

A. That is on hot concentrate, frozen, and single strength?

Q. You can break it down and get the total capacity.

A. I had what I figured was a total capacity arranged for of about 18,000 to 19,000 tons of fruit a week.

Q. And that time what was your expectation

(Testimony of James A. Finley.)

with respect to the fruit which would be delivered to you for disposition in by-product form?

A. According to estimates and running it out on a weekly basis, we figured we would have about 15,000 tons a week.

Q. Now, will you tell us how the 18,000 tons of capacity was broken down, eighteen or nineteen thousand?

A. Among the different processors?

Q. Yes. No. As between various types of product.

A. Well, between the hot—I will have to refer to my notes. About 5,000 tons a week outside of our own capacity.

Q. How much total capacity did you have for frozen concentrate?

A. Had about between eleven and twelve thousand tons a week of frozen capacity lined up, including our own capacity.

Q. And what capacity for single strength?

A. We had about 3,000 tons a week—wait a minute. About 3,000, 3,200 tons a week in addition to our own capacity. I consider in our own capacity Exchange Lemon, so it would run up to about 4,000, including Exchange Lemon. [3649]

Q. Then how much hot concentrate capacity did you have arranged for?

A. About 4,300 or 4,500 tons a week, which includes Bireley's that when they would be running on hot concentrate, of course, they couldn't run on frozen, so when I put them on frozen, they couldn't

(Testimony of James A. Finley.)

stay on hot. 3,300 tons a week, not counting the Bireley's, and Bireley's could go either way for me.

Q. When you concluded those arrangements, did you feel that you had provided sufficient capacity to process the maximum amount of fruit that might be delivered to you for processing during a week?

A. Yes. We figured that we had, with the arrangements that we had made or contacts we had made, enough to carry any week throughout the balance of the season.

Q. Can you tell us what processing facilities, capacity of facilities, there were other than those which you had made available to Orange Products other than your own, and other than those that you had contracted for?

A. The capacity of the other plants outside those of our own and those which we made arrangements with, was 14,580 tons a week, compared to ours of 18,600.

Q. Can you tell us roughly what the percentage of the outside capacity was?

A. The total capacity per week would be 33,000. The [3650] Exchange was 56 per cent. So the outside capacity would be 44 per cent.

Q. When you say the Exchange, you mean that which you owned, as well as that that you contracted for?

A. Yes. It includes Exchange Orange and Exchange Lemon, Sunkist organizations.

Q. Can you tell us what policy you followed over the years down to and including 1951 with

(Testimony of James A. Finley.)

regard to making use of and having available to Orange Products the facilities of outside or independent processors?

A. I don't quite get your question, Mr. Strachan.

Q. Put it this way: Over the years and down to and including 1951, did you have a policy to make use of outside facilities to the full extent that you could, rather than to provide in competition with those facilities your own equipment and plants?

A. Well, our policy—I say our policy, that is the board policy was to, as the crop increased and the amount going to products, was to use the present facilities of the plants. A number of them wouldn't be run the whole year, so it would be to use their equipment instead of the growers putting in capital to enlarge our operations. When they got through; why, instead of leasing their plant or making some other arrangement, it seemed to work better to go into custom packing or grower participation methods. So it was the [3651] general policy at that time to hold down the Exchange Orange expansion and use the other facilities [3652] first.

* * *

Q. Mr. Finley, in stating the capacities of the Orange Products facilities, and the facilities which it had arranged to use under various processing contracts, there was some overlapping. Would you state the capacities and eliminate the overlapping of functions?

(Testimony of James A. Finley.)

A. Taking the place of a juice plant, the capacity of the total plant may be the juicing capacity——

The Court: That isn't what counsel is referring to, I don't believe.

You talked about one plant that might have been used for one purpose or another, and you gave certain figures. Isn't that what you are talking about, Mr. Strachan?

Mr. Strachan: Yes, your Honor.

The Witness: Bireley's plant, I think I referred to, that they could run either on frozen concentrate or straight [3653] concentrate. When the question was asked on the amount of concentrate, I may have overlapped.

The same thing applies to the Exchange Orange Products. We can run either frozen or straight concentrate, but we can't always run at the same time. So you get an overlapping of those, so when you total up the capacity on the frozen concentrate and single-strength juice separately, you may get more than the total the plants can run at any one time.

Q. (By Mr. Strachan): You stated approximately 18,000—I think you said 18,000 or 19,000 total tons of capacity?

A. 18,600 is the way I figured it.

Q. Does that involve some overlapping?

A. No, that doesn't involve overlapping. They can run either one or the other.

(Testimony of James A. Finley.)

Q. That is the maximum capacity that you obtained?

A. That we had arranged for, contracted for.

Q. You said that these participation arrangements were entered into because it was not known what the realization from the product might be because of the uncertainty of future market conditions. Will you tell us how, in practice, those contracts have worked out?

A. The one grower participation contract over a period of years was the TreeSweet, and there was one year, I remember, that it paid more than—as a result of the contract we got more than the C. D. P. sold fruit for. [3654]

The Court: "C. D. P."?

The Witness: Citrus Distributing Plant.

Q. (By Mr. Strachan): That is Mr. Kelly's department? A. Yes, as fruit.

The Court: You mean more than fresh fruit or more than product fruit?

The Witness: More than product fruit.

The Court: Fresh fruit, of course, always brings more?

The Witness: Yes.

Q. (By Mr. Strachan): In carrying out and supervising the performance of these contracts, such as the TreeSweet and the Silzle contracts, did you take any steps to determine at what prices the processor was actually selling the processed juice?

A. No, we took no steps to follow that.

Q. The amount that was returned to Orange

(Testimony of James A. Finley.)

Products under these contracts in no way depended on whether the price of the processor was higher or lower than the Sunkist posted price for the juice, is that correct?

A. Sold to them at the Sunkist price of juice, less the discounts, and they could sell it at any price they wanted to after that. If they wanted to speculate in the market, that was their business.

The Court: I don't think you have answered the question. Now, listen to the question. [3655]

Mr. Strachan: The answer is acceptable to me, your Honor. I don't think it should go out. I think it is relevant.

The Court: All right. Then it may remain in.

Read the question again, and answer the question.

(The question referred to was read by the reporter as follows: "The amount that was returned to Orange Products under these contracts in no way depended on whether the price of the processor was higher or lower than the Sunkist posted price for the juice, is that correct?")

The Witness: That is correct.

Q. (By Mr. Strachan): After you had arranged to have available processing capacity for the '51 season, based upon your estimates as to the quantities of fruit that would be received, will you tell us how the actual receipts of the fruit compared with the anticipation or the estimate that you had made in advance?

(Testimony of James A. Finley.)

A. We never did reach the anticipated quantity of fruit that we had originally set up in our estimate.

Q. Do you have before you Exhibit FD?

A. Yes, I do.

Mr. Strachan: I would like to have a copy of that distributed to the jury so that they may follow the testimony. [3656]

The Court: It may be distributed.

(The copies were distributed to the jury.)

Q. (By Mr. Strachan): Mr. Finley, as I understand it, Exhibit FD is a graphic chart showing for the years 1947 to 1951 the weekly tonnage receipts of by-product oranges received by the Orange Products Company, is that correct?

A. Under the control of Exchange Orange Products Company, not outside sales.

Q. The heavy line, which is the highest there, shows the receipts for the season 1951, is that true?

A. That is true.

Q. I believe you said you had estimated that the receipts would be at the rate of something like 16,000 tons a week?

A. Figured between fifteen and sixteen thousand tons would be the pack.

Q. With reference to the curve that is plotted on Exhibit FD, will you tell the jury what significance this chart has with reference to the estimates and planning you had done beforehand?

A. I think it shows that we were planning; had

(Testimony of James A. Finley.)

plans made for a larger amount, that the peak was reached the fifth week in July, just a little over 14,000 tons, and then leveled off to the third week in August, and then started down the first week in September, was down to 12,800, and then the [3657] fourth week in September, it hit clear down to about 8,500, at which time it started going back up again.

The Court: I understood you to say you estimated the peak at fifteen to sixteen thousand tons. You didn't estimate that for every week?

The Witness: No, just for the peak weeks.

The Court: All right.

The Witness: From, oh, the middle of July on to the middle of September.

Q. (By Mr. Strachan): Do you recall having a conversation with Mr. Winckler in the summer of 1951, some time in July? A. Yes, I do.

Q. Was that a personal conference or was it a telephone conversation?

A. It was a telephone conversation.

Q. Can you fix the time of that conversation?

A. Yes. It was, within a day or so, around July 15 or 16, 1951.

Q. Did he call you or did you call him?

A. He called me.

Q. Tell us what was said in that conversation.

A. He asked me if he could get fruit through Exchange Orange Products Company, and I told him we did not sell fruit, that we did not have a

(Testimony of James A. Finley.)

surplus of fruit at that time to handle, and for him to contact Mr. Kelly of CDP. [3658]

Q. During that conversation did Mr. Winckler make any mention to you of there being a price quoted of $2.20 per case of 12 46-ounce cans of single-strength juice? A. No, he did not.

Q. Do you recall what the price of juice was at the time of your talk with Mr. Winckler?

A. It was around $2.65 a case, $2.65 a case of 46-ounce. It was $3.00 just before that, and I don't remember when he called, just where that break was, but I remember the break came during that period of time.

Q. You told Mr. Winckler that you had——

The Court: Just ask the question.

Q. (By Mr. Strachan): What did you tell Mr. Winckler at the time you talked to him with regard to your own supply of fruit and the facilities that you had available for processing?

A. I told him that the supplies were coming in irregularly, I didn't know how they would come out, and I had plenty of facilities to handle the crop as I saw it.

Q. Was that true at the time you stated it to Mr. Winckler?

A. That was true at the time I stated it in the middle of July.

Q. Will you tell us what was done after the third week in August when the supply of available products oranges [3659] started to decline in re-

(Testimony of James A. Finley.)

gard to what you did with the capacity that you had arranged for?

A. Which week was that?

Q. You pointed out this decline started about the third week in August. What did you do following, during the ensuing decline?

A. Well, we shut down Hyland Stanford, which was running on hot concentrate for us on a custom packing basis and——

Q. As of about what time was that?

A. That was about August 18.

Q. What other measures did you take then?

A. We slowed down Mission, and they ran for another week or so after that, and then we shut them down.

Q. What did you do in regard to the arrangements you had made with Mutual Citrus Products Company for frozen concentrate?

A. The cans which we sent to them on July 25, we never made the test run which we anticipated, and by August 25, we knew we wouldn't need them as processors and had the cans returned to Ontario, and we filled them there, so we knew that we would not hit the 15,000 then.

Q. What, if anything, did you do in regard to the arrangements you had made with Harts when the fruit was in short supply?

A. As soon as the fruit became short, we shut down [3660] Harts, slowed them down first, and finally shut them clear down.

Q. Do you remember when you finally cut back

(Testimony of James A. Finley.)

the supply of fruit that you could make available to them?

A. We started cutting down about the middle of September, September 15, and then they were through about a week or 10 days after that, through for the season.

Q. What did you do in regard to Bireley's?

A. Bireley's, we slowed them down about one-half and wanted to hold them in case the fruit picked up again, and finally they were shut down completely and then they started up on their own account, not our account.

Q. When you say they started up on their own account, you mean that when you suspended the operation of the custom packing deal or the arrangement for packing for your account, they bought fruit elsewhere?

A. They bought from Sam Kelly or other independent shippers. I don't know where.

Q. That was to pack what product?

A. That was to pack Bird's-Eye frozen concentrate.

Q. At the time you were talking to Mr. Winckler in the middle of July, how did the supply of fruit relate to the processing facilities that you had arranged for?

A. Arranged for around 16,000 tons of frozen and single-strength juice and had arranged for a total capacity [3661] for canned and hot concentrate of about 18,600 tons, not counting any ar-

(Testimony of James A. Finley.)

rangements that we could have made on frozen concentrate with MCP. [3662]

The Court: That is per week?

The Witness: Per week, yes.

Q. (By Mr. Strachan): By approximately how much did that available processing capacity exceed the fruit available?

A. Fruit available, maximum, hit 14,300 tons, and we had available 18,600, so it would be about 4,300 tons that we had definitely arranged, not counting the empty cans for test runs.

Q. You talked with Mr. Winckler again in the month of September, is that correct?

A. Yes, I did.

Q. Do you remember having had any conversations whatever with Mr. Winckler between the telephone conversation you mentioned in July and the talk that you had in September?

A. I don't remember of any telephone conversations at all.

Q. Or any personal conversations?

A. No personal contact, official contacts.

Q. When and where, and under what circumstances, did you have your talk with Mr. Winckler in September?

A. He called again by telephone. I can set that date pretty well, because it is the time when we cut TreeSweet and Silzle down one-half in their production. McCracken of TreeSweet was in Florida, and he called me from there and wondered what it was all about. And that occurred, I [3663]

(Testimony of James A. Finley.)

know, the week that we cut the processors down, because I was flooded with telephone calls to know when they could start up again, and what they should do with their labor, and things like that. So it sets the date in the middle of September.

Q. Was this a telephone conversation with Mr. Winckler?

A. That was a telephone conversation.

Q. Will you tell us, in substance, what each of you said in that telephone conversation?

A. Well, that is the first that I knew that he knew that we had working contracts with Tree-Sweet and Silzle, and he asked if he couldn't have the same type of contract. And I told him no, that he couldn't, I was having plenty of trouble right at that moment with those that we did have contracts with wanting more fruit, rather than less fruit, so I just couldn't give him a contract and cut off our old customers.

Q. Was that the first conversation, the only conversation which you had with Mr. Winckler in which he asked you for one of these participation contracts on single-strength juice?

A. Yes, that is.

Q. Will you tell us when it was that you first heard that single-strength juice was being sold or quoted at a [3664] price of $2.20 per case of 12/46's?

A. It was shortly before Sunkist came out with opening prices on August 3rd. It may have been within the week before that. And that is the first

(Testimony of James A. Finley.)

time I heard of a $2.20 price. The Florida price was $1.75 f.o.b. Florida. We add on 75c for freight, putting it in California at $2.50. So we were ready to come out with opening prices on August 3rd, and it came up in those discussions at that time, and we came out with an opening price of $2.50 in the State and $2.20 out of state to meet other competition.

Q. The quotation of $2.20 had been made before you came out with your opening price?

A. I think it was.

Q. Mr. Finley, in the year 1951 when you were busy arranging for processing capacity, did you have any matters in mind which bore upon your opinion as to whether the Winckler & Smith Company would be qualified to enter into and carry out any sort of a processing contract with Orange Products Company? A. Yes, I did.

Q. Will you tell us what some of those matters were?

A. Well, I had had business dealings with Mr. Winckler, and we had some product made by him, and then what I heard from others in the industry.

Mr. Dixon: If the court please, I move that the latter [3665] part be stricken as purely hearsay.

The Court: Do you propose to go into this hearsay?

Mr. Strachan: What?

The Court: Do you propose to go into the hearsay?

Mr. Strachan: It is not hearsay. It is reputation

(Testimony of James A. Finley.)

in the trade, and we are going into state of mind of the man who is responsible for conduct here.

The Court: I disagree about the hearsay, but it may be proper to go into it. I am just asking you if you are going into what I have characterized as hearsay?

Mr. Strachan: I wouldn't expect that any of this would be hearsay. If it seems to you that we are getting close to the line I will be very glad to discuss it.

The Court: Whether you call it that, or whether I do, my question to you is are you going into those matters?

Mr. Strachan: Going into what he heard? Yes, I will go into what he heard.

Mr. Dixon: I, of course, object to that, your Honor.

The Court: I think it is permissible, but, on the other hand, I think the jury has to be told that what he heard and what he might repeat is in no sense evidence of the truth of those facts.

Mr. Strachan: I quite agree that it is your Honor's duty to instruct the jury——

The Court: It is a dangerous kind of testimony, and the [3666] jury should know how they may use it and how they may not.

Mr. Strachan: I quite agree with that, your Honor.

Mr. Dixon: If the court please, how can plaintiff answer this kind of testimony without having an opportunity to cross-examine the person who alleg-

(Testimony of James A. Finley.)

edly made these statements? How are we to refute them?

The Court: That is why it is dangerous.

Mr. Dixon: It would seem to me we would be here for another month if we go into hearsay testimony of this kind. I don't see how it could possibly be permissible.

Q. (By Mr. Strachan): You said, Mr. Finley——

The Court: Now, wait just a minute.

Mr. Dixon: If the court please, I would like to be heard on it in the absence of the jury.

The Court: I think we will let the jury remain here in the courtroom in the custody of the bailiff, and we will adjourn to chambers with the reporter.

(The following proceedings were had in the chambers of the court outside the presence of the jury.)

The Court: The record will show, Mr. Reporter, who is present.

(The following persons are present: Mr. Dixon, Mr. Strachan, Mr. Fisher, Mr. Stark, Mr. Irwin, the clerk, and the reporter.)

The Court: What do you propose to show that Finley [3667] heard, just a summary?

Mr. Strachan: What he heard, I believe, will come in only in corroboration of some of the things that he learned in other ways, which was a statement by a former sales manager of Winckler &

(Testimony of James A. Finley.)

Smith Company, who, when asked whether Winckler was watering his product, this fellow said, "I don't know, because I was instructed never to go into the plant."

The Court: When did this conversation take place?

Mr. Strachan: This took place in, I think it was the fall of 1950.

Mr. Dixon: You think, counsel? Don't you know?

Mr. Strachan: I don't go around with testimonial knowledge.

Mr. Dixon: This is important to this plaintiff.

Mr. Strachan: It is prior to the Valencia season of 1951.

Mr. Dixon: If that is the testimony, the witness should be here to so state, and if he did so state——

The Court: Have you looked up any law on this?

Mr. Strachan: Well, I haven't for this particular purpose, but I have at other times. State of mind testimony, reputation is admissible on state of mind. Not to show that the reputation is well founded, but to show what the effect of that reputation was on the person's mind. [3668]

The Court: The only probative value of this is to explain why Finley did or did not do something.

Mr. Strachan: That is right.

The Court: Therefore, your argument would be that it assists the jury in determining how he did it. But how do you escape the fact that that puts

(Testimony of James A. Finley.)

in issue the credibility or the truthfulness of what he heard?

Mr. Strachan: It doesn't seem to me that that puts that in issue at all. He heard it and he believed it, and that accounts for his state of mind, your Honor.

Mr. Dixon: Your Honor, if this kind of thing is permissible, we have a file of letters from consumers complimenting the product of this plaintiff, that were wholly unsolicited. I would not even suggest that they could be admitted in evidence. Yet, if this kind of thing is to be permitted, I see no end to, not only this kind of testimony, but any rebuttal that may be required to prove it.

I don't even know how, at this time, we could rebut it, in the absence of the witness. He is not here, this silent witness who allegedly said something to this party, who was never placed on the stand for cross-examination.

Now, furthermore, it seems to me that in view of the testimony of Mr. Finley already in the record, that it made no difference to him what happened, in other words, his testimony, as I recall, was that Finley would not give the TreeSweet contract to any other processor. [3669]

In my mind, when that testimony was put in the record, that effectively blocked any further consideration, if it be relevant and if this be permissible, which I do not admit, in this lawsuit.

Mr. Strachan: This will go further than that, of course.

(Testimony of James A. Finley.)

Mr. Dixon: No, unless you are trying to bring in the back door now what you couldn't get in before.

Mr. Strachan: No. This is why they hadn't even given him the Silzle contract.

The Court: Now, wait a minute. Since you don't offer the things that Finley may have heard as truth of the facts contained therein, why shouldn't you be limited to asking Finley whether he had heard certain matters, without stating what they were?

Mr. Strachan: I would certainly emasculate any showing as to what it was, "Yes, I heard certain matters." The jury might infer he had heard what Winckler said, that Winckler was a fine, high-grade operator, made nothing but high-grade juice.

The Court: You admit you are not offering it for the truth of the facts purportedly contained?

Mr. Strachan: No, but what he heard should be before the jury to see whether on the basis of what he had before him and what he knew and what his state of mind might have been that he was warranted in conducting himself as he did. [3670]

The Court: Do you contend he based a refusal on these things he heard?

Mr. Strachan: I contend not entirely on the things he heard. The things he found out for himself through experience.

The Court: He has already stated why he based his refusal.

Mr. Stark: Not an exclusive reason.

(Testimony of James A. Finley.)

Mr. Strachan: He said what he told him.

The Court: He has already testified he told Winckler why he wouldn't give him a comparable contract.

Mr. Strachan: That was true at the time in September when he asked him for it. Now we are going back to see why it was that he didn't regard hir as being eligible for a TreeSweet or Silzle or any other kind of contract when he was securing additional capacity in anticipation of a bumper crop.

The Court: All right. You say he is going to repeat what some former sales manager told him.

Mr. Strachan: That will be one little detail.

The Court: Have you tried to subpoena the former sales manager?

Mr. Strachan: No, but I can get him in here if Mr. Dixon will agree that the conversation between these two is admissible and that the former sales manager will testify to what he knew about the quality of the product. That has been excluded so far. [3671]

The Court: Whether Mr. Dixon agrees to it or not has nothing to do with the question of whether he will be brought in as a witness.

Mr. Dixon: Mr. Finley has already testified that the reason given at the time, which is certainly the best evidence, was, as I recall, he had already made arrangements and that the second time he talked to him was in September. Now, that is his testimony. Now they are trying to again inject into this case,

(Testimony of James A. Finley.)

to the prejudice of the plaintiff, through the back door something that Finley says he heard, not as the basis of the reason for what he did, though.

Mr. Strachan: Mr. Dixon, will you agree we were justified in not giving him the contracts on those assigned reasons at the time of those two conversations?

Mr. Dixon: No, I don't.

Mr. Strachan: That's just it. That is the reason it is essential for me to go further and show there were other reasons.

The Court: What other things by other witnesses were told Finley?

Mr. Strachan: I don't think of anything else that even comes close to hearsay in the entire line of examination I propose.

The Court: I may not agree with you. What is it you [3672] propose?

Mr. Strachan: I think that is the only thing that he says was told him. The rest of it is matter that he learned on his own.

The Court: What did he learn and from whom?

Mr. Strachan: Do you want me to put the case in out of the presence of the jury and let you pass on it?

The Court: That is what I am suggesting to you. I think you had better make an offer of proof right now of what Finley would testify to on this subject matter.

Mr. Strachan: All right. I will have to get my notes, if I may.

(Testimony of James A. Finley.)

The Court: All right. Let me ask you one other question before you start or, rather, ask Mr. Dixon.

Are you going to contend that Finley or EOP should have gone voluntarily to Winckler & Smith and offered comparable contracts? Or are you going to base your contention solely on such requests as were made, according to the evidence, at least, most favorable from your standpoint?

Mr. Dixon: That's right.

The Court: Not on any contention they should have gone around to him in the spring?

Mr. Dixon: If that is going to be part of the evidence, yes, of the existence of the conspiracy, that they went to everybody except Winckler, yes, your Honor. [3673]

The Court: And you are arguing inferentially, therefore, that they should have gone to Winckler?

Mr. Dixon: Well, by reason of their control, and so forth, yes. This contract, which was made and which has been in existence now for five years, is the hub of this case. They call it one thing. I would give it a different name.

The Court: All right. You have answered my question.

Now, make your offer of proof.

Mr. Strachan: The witness would testify that he did not regard the Winckler-Smith organization as being in any way comparable to TreeSweet.

He would mention in that connection that the TreeSweet company was a company that had been

(Testimony of James A. Finley.)

in existence and successfully marketing California Valencia products since 1937, had a well-established brand name and a marketing organization with a demonstrated ability to pack for inventory and to maintain sales on a nationwide basis throughout the year, which he did not believe Winckler & Smith could do.

He would also testify that he had personal experiences with Winckler-Smith. The first experience was in 1947 when he came back from a trip and found that the plant superintendent in his absence had arranged to have Winckler-Smith process some 65 degrees Brix concentrate for the Exchange Orange Products account.

That under that arrangement Sunkist furnished the fruit [3674] and paid a fixed fee for processing. During the performance of that agreement testing showed that the product was wholly unsatisfactory, that there were black specks which were due to insufficient cleaning of the fruit before processing; that in order to remove the specks, the product had to be diluted and reprocessed.

In addition, it was found on testing that some of the product was not properly sterilized and was in the process of decomposing, had yeast and mold in it, and some of it was so badly deteriorated that it had to be washed away, and the balance had to be reprocessed.

He would testify that during the performance of this arrangement in an effort to establish satisfac-

(Testimony of James A. Finley.)

tory quality, a sanitation engineer and bacteriologist were sent to the Winckler-Smith plant to suggest means of improving the sanitation.

That following that, in August, 1947, a second contract was entered into for processing hot concentrate. For a short time the quality was satisfactory, but before long the product became unsatisfactory in that it was not sterile, had yeast and molds in it, and that product also had to be in part run down the sewer.

He would also testify that following that experience with Winckler-Smith he never entered into any other processing arrangement with Winckler-Smith. [3675]

He would also testify that he had contacts with Mr. Winckler during the period of the Chapter XI receivership; that the occasion for those contacts was this: Mr. Wilcox and Mr. Armstrong learned that Winckler-Smith company had made a bid on a school lunch contract but was not able to secure fruit and in consequence was going to default. Wilcox and Armstrong felt that the industry as a whole should see to it that there was no default on a Government contract, and told Finley to try to work out some arrangement which would enable the contract to be completed.

Finley, with legal counsel and with court approval, worked out an arrangement with the receiver, and that arrangement was one under which Sunkist would furnish the fruit and American Can furnish the containers. Moneys due from the Gov-

(Testimony of James A. Finley.)

ernment were assigned to a bank for the payment of the EOP and American Can charges as a first lien, and the contract was performed on that basis.

This arrangement was not a processing agreement, but was a sale of fruit to the receiver, and the deferred payments were on a secured basis.

During the performance of this arrangement, Finley was first in contact with Winckler, but shortly after that he was instructed by Lynch, the receiver, not to do any business with Winckler; he said that the arrangement was not the Winckler-Smith arrangement, but was one strictly [3676] between the receiver and Finley, and that Winckler was not to have anything to do with working out the details of this transaction.

Also, in the fall of 1947, Mr. Winckler called Finley and said he was short of cartons. Finley said he was short of cartons, too, that they were very hard to get, and he couldn't sell any.

Winckler told Finley that if he couldn't buy any, he would like to borrow some, because he had an order to deliver, but had no cartons, although a carload was due to arrive the middle of the following week, and that the borrowed cartons would be returned at that time.

By the end of the following week the cartons had not been returned. Finley contacted Winckler. Winckler claimed that there had been a delay in the delivery. Weekly thereafter for a matter of several weeks Finley tried to get the cartons returned,

(Testimony of James A. Finley.)

but was always told that Winckler didn't have any on hand and couldn't return them.

In the spring of 1948 when the Winckler-Smith company went into Chapter XI proceedings, the cartons had not been returned, so claim was filed for the cartons in the bankruptcy proceeding. The cartons had a value of $328, for which in June of 1949 Orange Products Company received a dividend of $36.20. No part of the balance has ever been paid by Winckler-Smith or any other person. [3677]

Finley was also aware that Winckler-Smith had been in financial difficulties and had uncertain financial ability and had been dealt with by CDP on a cash in advance basis.

He also had doubt as to the quality of products produced by Winckler-Smith company.

In the first place, he knew that the Winckler-Smith plant did not have adequate grading and sorting tables and equipment, and that the fruit was not properly graded before it went into the processing room.

The Court: When did he know that?

Mr. Strachan: He knew that in—well, some time prior to 1948, your Honor. I think it was 1946 or 1947.

Mr. Dixon: Had he been in the plant since that time, counsel? [3678]

Mr. Strachan: No. But shortly after the Winckler & Smith—it is in 1946. In 1946 they were working on a navel crop that was running very high in decayed fruit. Finley had objected to it and advised

(Testimony of James A. Finley.)

C. D. P. that if the quality of the fruit that was being sent over couldn't be improved he would simply have to quit trying to process it, because he didn't have sufficient force to eliminate the decays.

He was told by Mr. Young that if Finley didn't want it, it could be sold elsewhere.

Finley told him to sell it wherever he could, but not to send any more to E. O. P.

Following that, when the Winckler & Smith Company went into Chapter 11 proceedings, Young of C. D. P. met Finley and said he wasn't surprised that Winckler & Smith had gone broke, because of the way he knew in which they were operating their business. He reminded Finley of the time that Finley objected to the rotten fruit and told him to sell it elsewhere; that Winckler-Smith had bought that fruit that Finley had objected to, and Young became curious to know how Winckler-Smith could handle it when Finley couldn't, so he went out to the plant——

The Court: Who went out?

Mr. Strachan: Young.

Mr. Dixon: When was this?

Mr. Strachan: 1946. [3679]

(Continuing): ——he went out to the plant and saw that the fruit was being sent to the extractors without any sorting or culling whatever. He looked the plant over and saw the condition of the plant and the manner in which it was operated, and was given some juice to take home. But after what he

(Testimony of James A. Finley.)

had seen he was afraid to drink it, and poured it all out.

The Court: Is Young alive?

Mr. Fisher: Yes.

The Court: All right. Go ahead.

Mr. Strachan: Finley also knew that the Winckler-Smith plant was equipped with only Citromat extractors, and that these extractors are not satisfactory for the production of single-strength juice. The Citromats, operating as they do through the pressure of rollers, are unsatisfactory for single-strength juice, because if the tension on the rollers is reduced so as to keep the contents of the peel from getting into the juice, the yield in juice is so low that they can't be profitably operated. On the other hand, if the tension is set sufficiently high to extract substantially the same amount of juice as other extraction machinery will, the content of the oils and so forth from the peel will be extracted with the juice.

Mr. Dixon: May I interrupt, counsel?

Was Mr. Finley ever in the plant of Winckler & Smith to [3680] see the de-oiling equipment that was on the Citromat?

Mr. Strachan: You can ask him that.

Mr. Dixon: Is he talking about the same thing?

Mr. Strachan: He will also testify that he had made experiments with Citromats, and that his experiments had convinced him that you could not satisfactorily produce single-strength juice with Citromats. He knew that Winckler-Smith was the

(Testimony of James A. Finley.)

only concern that had ever undertaken to sell single-strength juice from Citromat machines.

That at one time the Bireley Company, who owned the patents on the process, had tried it, but had given up, and that no other processor had ever sold Citromat-extracted juice for single strength, except Winckler & Smith. [3681]

In 1950 Finley became convinced in his own mind that Winckler-Smith products were watered to the extent of 25 or 30 per cent. He came to this conviction in 1950 when he made a trip to the Phoenix area in Arizona to try to salvage a crop of frozen grapefruit. The prices at which Winckler-Smith Company were selling grapefruit juice at that time was—I think it was about 40 cents lower than the Sunkist price, and the Sunkist grapefruit juice was being extracted and otherwise processed to the can in Arizona with no hauling charges to account for, and the price of the grapefruit at that time was $22.50 a ton. When Finley got to Arizona he learned that Winckler-Smith was buying grapefruit and shipping it to Anaheim, with shipping charges of approximately $9 or $9.50, I have forgotten which, which brought the total cost of the fruit at the processing plant to something over $30 a ton.

Finley made a computation at that time, and he has the computation which he would go through, to determine how the juice extracted from a ton of grapefruit could be sold at the prices that Winckler-Smith was quoting on the grapefruit juice, and his computation indicated that Winckler-Smith was

(Testimony of James A. Finley.)

having to realize approximately 30 per cent more, or stretch their product, as he puts it, 30 per cent more than the juice that could be extracted from the grapefruit, in order to break even on the sale of the juice at the price [3682] that they were quoting.

He would also testify that after he had made this computation, and taking that in connection with what he knew about the characteristics of Citromats and the product of Citromats, he concluded that it was only by adding water to orange juice that Winckler was able——

The Court: Grapefruit juice, you mean?

Mr. Strachan: No. After he made the computation with respect to the grapefruit juice, and thinking back over the fact that Citromats only were used in juice extraction, he became convinced that it was through watering the juice extracted on Citromats that Winckler was able to produce and sell what he branded as orange juice.

(The following statement, which had been interrupted, was read by the reporter: "* * * and taking that in connection with what he knew about the characteristics of Citromats and the product of Citromats, he concluded that it was only by adding water to orange juice that Winckler was able"——)

Mr. Strachan (Continuing): ——was able to manufacture the product that he sold under the label of orange juice.

(Testimony of James A. Finley.)

He would also testify that after a board meeting at which he had reported on his efforts to get sufficient capacity to process the bumper crop, he was asked by a board [3683] member, whom he cannot identify, "What about Winckler-Smith?" And he told the board member he couldn't enter into an arrangement with them because he wouldn't have enough inspectors available to police the operations of Winckler-Smith.

He would also testify that having all these things in mind in the year of 1951 he would not have been willing at the time he talked with Winckler on either occasion to enter into any kind of a processing arrangement with the Winckler-Smith Company, even though fruit had been available at those times. And for the same reasons it never occurred to him to contact Winckler-Smith in advance of the season.

The Court: Is there objection to the offer of proof?

Mr. Dixon: Yes, there is, your Honor, to most of it.

The Court: I am going to exclude certain parts of it now. That will save some time.

The objection is generally on what grounds?

Mr. Dixon: On the grounds that some of it is hearsay evidence and not the best evidence, and to permit it in this case would deprive the plaintiff of the right of cross-examination, and so forth.

The Court: All right.

Mr. Dixon: Second, that much of the evidence

(Testimony of James A. Finley.)

contained in the proffer is too remote in point of time and not based on direct knowledge of the witness making the statement. [3684] And, third, that that part of it which relates to the belief that the product wasn't good, according to the witness' standards, is not supported by any test of the product, which could readily have been made by the witness at the time he said he had these views, with all of the facilities available to Exchange Orange in their laboratories and so forth, and that it is, therefore, inadmissible on the further ground that it is purely an unsupported and apparently a biased opinion of this witness, which was unfounded on any personal knowledge or examination of the product itself, which, if permitted, would again inject into this case the question of the quality of the product processed and sold by the plaintiff.

Mr. Strachan: Your Honor, there are a couple of matters that I recall now, which I didn't recall at the time that I was making the offer, and I would like to add now, if I may.

The Court: Yes.

Mr. Strachan: Some time after the computation made with reference to the Arizona grapefruit, and after he had come to the conclusion that the only way Citromats could be used for making an adequate quantity of palatable orange product was by watering, he talked to Charles Sisk, who was at one time a sales manager for Winckler-Smith and had left Winckler-Smith and had come to the Sunkist organization. [3685] Finley told Sisk of the com-

(Testimony of James A. Finley.)

putations he had made and the conclusions he reached, and asked him what about it, does Winckler-Smith water their products? And Sisk said, "I couldn't prove it in court, but I am sure they do. Winckler, though, ordered me strictly never to go out in the plant, and I was never allowed in the plant while I was sales manager."

In addition to that, the witness will testify that inasmuch as 25 or 30 per cent of water was added to the citrus fruit juice, it would so reduce the acidity and the Brix that it would be necessary to add sugar or some similar substance to raise the Brix, and it might be necessary to add acid to increase the acidity, but that there is no analytical method known by which it can be determined whether water, sugar, or acid have been added to natural juice in order to compare that with the finished product. It is only possible to determine whether adulterants of that sort have been used by comparing an analysis made before and an analysis made after.

Mr. Dixon: Do you mean there is no known way of determining whether what you claim was done here was done? [3686]

Mr. Strachan: There is no way known of analyzing a finished product to determine whether water, sugar and acid have been added to natural juice.

Mr. Dixon: That is the best answer to my objection, your Honor.

Mr. Strachan: Furthermore, the witness would also, if permitted to do so by the rulings of this

(Testimony of James A. Finley.)

court, testify that he has examined the records of Winckler-Smith, being the laboratory statistics I-1 to I-4, inclusive, and the production records, Exhibit J, and that his examination of those confirms the estimates and personal convictions he arrived at with respect to the adulteration of the Winckler-Smith product.

Mr. Dixon: If the court please, may I just add this comment? I want to be sure the record shows my objection previously made to this testimony on the ground it is irrelevant and immaterial because the witness has already testified that it wouldn't have made any difference, he wouldn't have given this contract or anything comparable to it to anybody except TreeSweet.

The Court: Well, I am going to cut down part of this right now. The offer of proof in connection with any of the conversations with Young is sustained. If you want to bring Young here as a witness, we will pass upon that question at that [3687] time.

The objections to the offer of proof are sustained about where you started about Finley becoming convinced of watering, and when he made certain calculations, as the opinion of a witness, injecting an issue into the case of which there could be a dozen and one answers, to mention one was the fact that the grapefruit could have been sold by Winckler & Smith at a loss.

Mr. Strachan: What is that?

The Court: The grapefruit could have been sold

(Testimony of James A. Finley.)

by Winckler & Smith at a loss, and the witness is injecting whatever he can be convinced of, and so forth. That objection is sustained.

Objection sustained as to his conversation with the board member, what he said to the board member and what the board member said to him.

Objection sustained as to conversation with Charles Sisk, the former sales manager. If you want to bring Sisk in, we will cross that bridge at that time, as to what he can testify to.

Objection sustained as to his opinions and conclusions and calculations about adding water and sugar, and with reference to the records I heretofore rejected and offers of proof heretofore rejected upon them.

It also seems to me there ought to be some time limit on matters of this sort. [3688]

Well, let me ask first, is there objection to the offer of proof with the parts I have indicated deleted?

Mr. Strachan: Is that addressed to Mr. Dixon?

Mr. Dixon: I am sorry, Judge. You say is there any objection to the offer of proof?

The Court: After these parts are deleted, are you still objecting?

Mr. Dixon: Well, I am not sure, Judge, whether this 1946 conversation——

The Court: I sustained an objection to that.

Mr. Dixon: That is sustained. As I recall the offer, as I was trying to follow it, I think that effectively takes care, as far as the plaintiff is con-

(Testimony of James A. Finley.)

cerned, of the so-called testimony we regard as hearsay and objectionable.

The Court: All right. That will be the ruling of the court. You can make your proof.

Mr. Strachan: Just so I understand the rulings, can I have the witness testify how he became convinced in 1950 that the Winckler-Smith products were being——

The Court: I sustained the objection to that, that he became convinced they were watered, that line about following a computation he made about grapefruit in Arizona, and so forth.

Mr. Strachan: You won't let him testify in 1950 he believed the Winckler-Smith products were watered? [3689]

The Court: That is what I have ruled in view of the issues it injects into the case, in view of the basis for what you said were his calculations, and on the offer you made.

Mr. Strachan: Of course, that effectively precludes us from showing what his state of mind was at the time he neglected to offer a contract.

The Court: I think there is merit to the other point of the objection that has been made here, that the testimony shows he said unequivocally he wouldn't have given a contract to Winckler because of the capacity that was involved. I don't think that this does anything but add and inject into the case other issues.

Mr. Strachan: In addition, Mr. Dixon isn't going to stop at that. He is going to say that is a

(Testimony of James A. Finley.)

trumped-up and phony reason, that there was no basis for it, that Finley, when he did that, was intending to injure Winckler, intending to pursue an unlawful course of conduct. Unless I can show the reasonableness of what he did and the state of mind with which he approached his business problem, I am absolutely helpless before that jury.

The Court: I have already sustained the objection to similar matters on the further ground it is an issue that was never called to the attention of the court, was not listed as an issue that you intended to produce at this [3690] trial, was raised for the first time during the trial, and my previous comments on objections will be incorporated here at this point.

Mr. Stark: Your Honor, in connection with that last statement, could we have clarification? If the only reason which can be given for this refusal is the reason at the time of the refusal, then it is correct to state that the failure to search out Winckler is not an issue in the case?

Mr. Dixon: I think so.

The Court: Mr. Dixon hasn't made too unequivocal an answer, but I don't contemplate I am going to let him argue anything about the duty on the part of——

Mr. Dixon: I don't intend to, your Honor.

The Court: ——the duty to search him out.

Mr. Dixon: I don't intend to do that.

The Court: His answer wasn't too unequivocal, but I don't think that is an issue in the case, be-

(Testimony of James A. Finley.)

cause if that was all that was involved, if the pleadings had shown they didn't search him out, I think the thing would have gone out on the pleading. So I don't think that is an issue. I think the issue is the refusal, and the instructions we have been working on—and you haven't been here and you haven't either, but we have been spending some time on this refusal business, and not anything about searching him out.

Mr. Dixon: I will not argue that, your Honor, that [3691] there was any obligation to search him out.

The Court: Well, let's go ahead then.

Mr. Fisher: But, your Honor, the reasonableness of the intent that he had in mind at the time he made the refusal is certainly important in this case.

The Court: You have a good bit left in your offer of proof besides what I have taken out.

Mr. Fisher: We had before, I think it was in connection with the admissibility of the brokers' letters to show the intent, and the rule is, and I remember the California cases cited, that for the purpose of showing the intent, what a person had in mind, that they could rely upon hearsay.

The Court: There is a general rule which smacks in this problem, but there are other problems in the case as well as that. One is the question of whether you can proceed to try a case of this magnitude upon issues which you raised for the first time dur-

(Testimony of James A. Finley.)

ing the trial, not put in the pleadings. I am content with my ruling, so let's go ahead.

Mr. Dixon: Your Honor, I wish to add this, because there may be some misunderstanding about it. If I understand the testimony of Mr. Finley, he has already stated he would give no other processor, he didn't mention Winckler & Smith particularly, but he wouldn't give anybody, any other processor, any contract comparable to the TreeSweet.

Mr. Strachan: This has reorganized the proof to such [3692] an extent that I wonder if we couldn't take the recess early. I will have to get together with Finley.

The Court: Why do you have to get together? You have an outline of what you have got there, and all you have to do is eliminate what I have sustained the objection to the offer of proof on. I don't follow you on that.

We will take the recess very shortly here, but let's go ahead now.

Mr. Strachan: I would like to look over these notes for a moment to see where I go next.

(Short recess.) [3693]

(The proceedings were resumed within the hearing of the jury as follows:)

The Court: The record shows the jury present. Proceed.

Q. (By Mr. Strachan): Mr. Finley, are you familiar with the statistical data that is collected in

(Testimony of James A. Finley.)

the Exhibit FE, and with the charts called "Pattern of Valencia Orange Utilization," contained in Exhibit FF?

A. I am familiar with the chart or the figures on FE, but I haven't got FF.

Q. I will just show it to you. Do you recognize it? A. Yes; I am.

Q. Those are correct representations of facts taken from the books and records of Orange Products Company, are they? A. Yes; they are.

Q. Before the recess you testified that you had had some dealings with Mr. Winckler of the Winckler-Smith Company; will you tell us about the first of those experiences?

A. I think the first experience I had with him was in '47.

Q. In what connection was that?

A. He called me up by phone and wanted to borrow some cartons, he had an order which he wanted to turn out within that week or the first of the next week. I told him that [3694] cartons were short, I didn't want to release any cartons.

He said that he had a carload coming in the following week and he would return the cartons.

I told him I wanted the cartons back and not the money, right now, because cartons were too hard to get.

He promised me he would return the cartons the middle of the following week. And it was not done.

And I called him a number of times after that to have those cartons returned, and it wasn't until he

(Testimony of James A. Finley.)

went into bankruptcy in 1948 that we finally sent him a bill for them.

Q. Do you remember the amount of the bill that was sent for those cartons?

A. It was a little over $300. 325 or so.

Q. How much was ever paid of that bill for the cartons?

A. I believe we got about 11 cents on the dollar. $30, $29 or $30.

Q. You got that from the receiver in the Chapter 11 proceedings? A. That's right.

Q. In 1949; is that correct?

A. Yes; we received our money in '49.

Q. You received the $30? A. Yes.

Q. Was the balance of that indebtedness ever paid? A. No; it was not. [3695]

Q. Did you ever have any experience with Winckler-Smith Company as a producer of hot concentrate under a contract with Orange Products Company?

A. Yes. In 1947 we had Winckler-Smith Company run hot concentrate for us on two separate contracts, one early in the season and a small one later.

Q. Will you tell us about what happened during the performance of the first of those two contracts?

A. That first contract was started about the 1st of June. We wanted the hot concentrate made, so we delivered him fruit and he returned the concentrate. We took the analysis on the concentrate. It had too many small black specks in it; it had a

(Testimony of James A. Finley.)

high yeast and bacteria count, which showed poor pasteurization, and then it had some larger black specks which we could look at under the microscope, which I think showed very poor sorting of fruit.

Q. Will you tell us what caused these large black specks that you found in the finished product as it was delivered from Winckler & Smith's plant?

A. It was caused by poor sorting of fruit before the fruit would go to the extractors to have the juice extracted.

Q. Mr. Winckler testified that in the Orange Products plant you had a lighted glass sorting table by which you would remove such spots; is that correct?

A. We have what we call a de-specking table, which is [3696] a glass table with lights underneath, and girls sit there with vacuum tubes to pick out small, immature seeds out of a pulpy type of product. Not out of a product such as this concentrate. We never run any concentrate over this table. It was what we call a pulpy type juice. [3697]

Q. How is it that you control the specks or eliminate specks from the hot concentrate that is packed in your plant?

A. Well, we have a better washing system where we can wash the fruit, and then run it through the separators, and being clean all the way through we keep the black specks out.

That is always a problem, though, in any plant.

Q. Will you tell us what you did with the products that were delivered to you under that first ar-

(Testimony of James A. Finley.)

rangement, the product that had the specks in it and that had the yeast and mold in it; what was done?

A. We got that into processing as soon as we could to repasteurize it; that that had the large black specks in it, we rescreened it and reprocessed it to get it in shippable form.

Q. Did you do anything in an effort to improve the sterility and cleanliness of the product of Winckler & Smith Company during that period that they were performing the hot concentrate contract?

A. Yes; we did.

Q. What did you do?

A. As soon as we knew it, shortly after the start of the contract the 1st of June, within a day of it, at the time you have your samples—it takes four or five days to run a bacterial count, and then you recheck it and make [3698] sure you are right, so we sent down our plant sanitarian and bacteriologist down to their plant to give them some suggestions as to how they could correct the condition.

Q. Following that did you enter into another contract for processing hot concentrate with the Winckler-Smith plant? A. Yes; we did.

Q. When was that?

A. That was the first of August.

The Court: The same year?

The Witness: 1947.

Q. (By Mr. Strachan): Will you describe what was done by Winckler-Smith in the performance of that arrangement?

(Testimony of James A. Finley.)

A. Well, they started out in pretty good shape bacteriologically, although in the middle of the thing we had a few batches that ran very high in yeast and bacterial count, and then it was brought down.

Q. What did you do with the bad batches that were brought in on that second transaction?

A. Those bad batches we just had to run them down the sewer. We wouldn't use them.

Q. Following that experience did you ever again enter into a processing arrangement with the Winckler-Smith Company? A. Never again.

Q. You did have some dealings with Mr. Lynch as [3699] receiver under the Chapter XI bankruptcy proceedings, did you not? A. Yes; in 1948.

Q. Will you describe how those dealings came about and what was done?

A. Well, that dealing, it was on a school lunch program, as we call it, and Mr. Wilcox or Mr. Armstrong had word from Washington, it was one of the California processors that wasn't able to fulfill a contract, they called me in to see what could be worked out, because they did not want to have a California processor fall down on the contract when it was promised, and I worked with Mr. Lynch. I didn't work with Mr. Lynch directly, at first, but first went to the attorneys to see if we could be properly protected on fruit if we turned it over to a bankrupt company, and the attorneys, with Mr. Lynch, the receiver, and the court, all set up so that the money received from the fruit and cans would

(Testimony of James A. Finley.)

be turned over to the bank, and then we would get our money from that source. That was our protection.

Q. Did you offer to allow other suppliers of by-products oranges to participate in furnishing fruit for this school lunch program?

A. Yes; we did. We felt that it was an industry problem, and Sunkist at that time being 65, 70 per cent of the industry, the contract was going to take about 5,000 [3700] tons of fruit, so Mr. Armstrong asked me if I would contact the other suppliers of fruit, such as Morgan Ward, M.O.D., and see if they wanted to supply their percentage. We were just interested in our proper percentage. Mr. Morgan Ward said he had an outlet for all his fruit and didn't want any of it. The M.O.D. said they would take theirs. So between the two of us we fulfilled the contract. [3701]

Q. As I understand it, this arrangement that you worked out with the receiver was not what would be called a processing agreement?

A. No. It was more of a deferred payment. We sold the fruit to the receiver and waited for our money until he got his money from the Government.

Q. So that the receiver in carrying out that contract was not processing the fruit for the Sunkist account or for a joint account in which Sunkist was interested?

A. No. Just for their own account or the account of their creditors.

Q. During the performance of that arrangement

(Testimony of James A. Finley.)

or carrying out of the arrangement, to what extent were you dealing with Mr. Winckler?

A. Well, I wrote the Winckler-Smith company, and Mr. Winckler as president, a letter giving the proposal for the benefit of the court records, I suppose, and then the next time it was after the court order and the court agreed to go ahead with it to the satisfaction of our attorneys, which is Farrand & Farrand, and we met up in Knox Farrand's office—I say we. It was Mr. Lynch, Mr. Winckler, Knox Farrand and myself, to go over the details of getting started and work out the balance of the contract.

Q. After the contract was completed and you were performing it, did you deal with Mr. Winckler or did you deal [3702] with Mr. Lynch?

A. I dealt mostly with Mr. Lynch's assistant. I don't know what they call them in court procedure, but it was a Mr. Mechlenberg that was running the plant for Mr. Lynch. I contacted Lynch right there at first and he turned me over and said to work out the balance of it, getting fruit and all that, with this Mr. Mechlenberg.

Q. He instructed you you were to deal with Mechlenberg rather than Mr. Winckler; is that correct? A. Very definitely.

Q. Will you tell us what the standards of quality are in the Sunkist organization with respect to single-strength juice?

A. Well, you have a standard, a U.S.D.A. standard, which is the minimum standard for juice, and

(Testimony of James A. Finley.)

the Sunkist standard or, you know, advertised brand, one that you are proud of, is limited so that it is what we consider better than U.S. Grade A. U.S. Grade A has a minimum of 10½ Brix. Our minimum of Sunkist is 11½ to 12 Brix, which is whole Brix more.

The maximum on standard U.S. Grade A is 1.4 acid. We have acid maximum, I think, in our Sunkist of 1.3.

It is a narrow range. There isn't the wide variation in flavor, Brix and acid in Sunkist as there is in U.S. Grade A. [3703]

Q. What about the oil content?

A. Well, the oil content, U.S. Grade A is less than three hundredths per cent. Sunkist is less than that.

The Court: Three hundred?

The Witness: Three hundredths.

Q. (By Mr. Strachan): In 1951 did you have in mind whether or not the equipment of the Winckler & Smith plant was such as would permit the production of single-strength juice of a quality to meet the Sunkist standard?

Mr. Dixon: If the court please, I object to that question unless counsel can testify of his own knowledge to inspection of the plant and what the facilities of the plant were at that time.

The Court: You may cross-examine on that when the time comes. Objection overruled.

The Witness: Well, I knew at that time, in 1951, and before that Winckler-Smith had Citromats,

(Testimony of James A. Finley.)

which is a type of juice machine like a wringer that you cut the orange in half and the juice is squeezed out, and the oil from the outer portion of the peel then gets into the juice.

We have Citromats ourselves and still have them. When the Citromats first came out experimentally we tried them for single-strength juice, but they would never turn out a quality product. There was too much oil and bitterness. If you loosen up the rolls, as they call it, so your yields [3704] of juice per ton would go down to a very inefficient point, you would improve the quality of the juice, because you would cut the oil, but it would be an operation you wouldn't even think of.

Q. What do you mean, you wouldn't even think of?

A. The juice yields would be down so low per ton it would be an uneconomical operation. So we would never do it.

Q. Based upon your familiarity with the Citromat machines, the experiments you conducted, were you of the opinion that there could be produced with Citromat equipment single-strength juice to meet the quality of Sunkist standards?

A. I was sure it could not meet those specifications. We worked on it ourselves. The inventor of the Citromat, which happened to be Bireley's, the first one, and we got the second one, they experimented with it and they did turn out some single-strength juice one year and gave it up.

(Testimony of James A. Finley.)

Q. Except for that and except for the Winckler-Smith operation, were there any processors in the California industry who attempted to produce single-strength juice on Citromats?

A. Not to my knowledge.

Q. Mr. Finley, at any time in 1951, assuming that you had had a surplus of fruit available for processing, would you have been willing to enter into any kind of a processing [3705] agreement with the Winckler-Smith company?

A. I would never have entered into a processing agreement with the Winckler-Smith company.

Mr. Strachan: That's all on direct.

The Court: Cross-examine.

Mr. Strachan: And on the basis of that testimony, your Honor, I offer Exhibits FE and FF.

The Court: Did you strike the one word off?

Mr. Strachan: No. I think they go in in the form they are in. Perhaps we can have a conference later as to a modification, but I should like to offer them in their present form.

Mr. Dixon: Well, subject to the previous objection made with reference to the exhibit, your Honor, I have no objection to it.

The Court: FE and FF received in evidence.

(The exhibits referred to were marked Defendants' Exhibits FE and FF and received in evidence.)

The Court: On each of these exhibits, there is the word "grower participation." If you will see on

(Testimony of James A. Finley.)

FE, that term refers to the products under the Tree-Sweet contract and the products under the Silzle contract.

In FF, which is a colored chart, you will have to be careful to look at the blue and the green which are fairly close. I trust none of you are color blind. If you are, [3706] those with good sense of color can pick them out.

Mr. Strachan: I wonder if I could reopen. Have you finished?

The Court: I haven't finished yet.

Mr. Strachan: I am sorry.

The Court: I think the blue on the chart refers again to grower participation. That again refers to products processed under the TreeSweet and Silzle contracts. This is a term, grower participation, which the defendants apply to these two contracts we have been talking about. You will draw no inference whatsoever from the words grower participation. It is just a tag to identify the products produced under the Silzle and TreeSweet contracts.

You may reopen.

Mr. Strachan: I would like to reopen and have copies of FF distributed to the jury and just let Mr. Finley explain the indications on the charts.

The Court: All right. Distribute FF.

(The copies were distributed to the jury.)

Q. (By Mr. Strachan): Referring now to the five charts that are included in the Exhibit FF, I would like to have you explain the manner in which

(Testimony of James A. Finley.)

those charts have been prepared and what the indications on the face of those charts are, what is represented by them?

A. They were prepared from our books according to the [3707] tons distributed through our different contracts to these companies by weeks. This is tons per week.

The Court: One chart for each year from 1947 through 1951, inclusive?

The Witness: That's right.

The Court: And the orange colored material represents the Valencia oranges processed by the processing plants of EOP?

The Witness: EOP at Ontario.

The Court: By weeks?

The Witness: That's right.

The Court: And the green, the next color, represents Valencia oranges processed for EOP's account, right?

The Witness: That's right.

The Court: That is where you had a contract with some organization or some arrangement with an organization to process goods for you, for EOP?

The Witness: We furnished the fruit and took the product, custom packing, as we term it.

The Court: That is the case there with the part of the chart on ELP, Lemon?

The Witness: Yes; that is for EOP's account.

The Court: The second part of that Lemon column—is that green or blue? Is this also green?

The Witness: That is also green. [3708]

(Testimony of James A. Finley.)

The Court: The same color. Then the yellow squares represent situations where you furnished the fruit and then took a warehouseman's lien, Lawrence Warehouse or otherwise, to secure your money and payment was deferred until the goods were sold?

The Witness: Until the goods were taken out of the warehouse.

The Court: Until the goods were taken out of the warehouse?

The Witness: Yes.

The Court: In those instances the goods were not processed for your account?

The Witness: No.

The Court: But for the account of the person who did the processing, but you had security for your payment?

The Witness: That's right.

The Court: And the fourth is the blue, growers participation, and refers solely to the Silzle contract and the TreeSweet contract?

The Witness: That's right.

The Court: Which the jury has already heard described.

The same plan has been carried over in each of the years, right?

The Witness: That's right, 1947 to 1951, inclusive.

Q. (By Mr. Strachan): Mr. Finley, one of the things [3709] that is shown by these charts is that

(Testimony of James A. Finley.)

you were using the facilities of outside processors to process not only under grower participation, but also for Orange Products Company account, even at times where the Orange Product facilities were not being used to full capacity; is that correct?

A. That is correct.

Q. Is that in accordance with the policy that you described this morning about making use of existing facilities rather than trying to monopolize or keep a large share of the product processed in your own plant? A. That's right.

Mr. Strachan: That's all. Thank you, Mr. Dixon.

Cross-Examination

By Mr. Dixon:

Q. Mr. Finley, Echange Orange Products is a corporation that does have stock, doesn't it?

A. It has what is called revolving fund credits or stock.

Q. Please answer my question. It does have stock? A. Yes. It is stock in that term.

Q. What is your answer?

A. You would call it stock. [3710]

Q. And that stock is all owned by Sunkist?

A. That stock is owned by Sunkist.

Q. And Exchange Orange does all of the processing of the by-product oranges, and what is left is turned over to Sunkist for distribution to the growers; is that correct?

A. Ask that question again.

(Testimony of James A. Finley.)

The Court: What is left, do you mean what is returned?

Mr. Dixon: Yes, sir; what is returned?

The Witness: What is returned is returned back to Sunkist.

The Court: I don't know whether the jury understands. By "returned" you mean the money returned?

The Witness: Yes; goes back to Sunkist, back to the growers, through that channel.

The Court: All right.

Q. (By Mr. Dixon): Then the growers are the real stockholders, are they, of Sunkist and Exchange Orange?

Mr. Strachan: I object. That is not the fact, and it is contrary to the stipulation that Mr. Dixon has entered into.

The Court: Reframe your question.

Mr. Dixon: All right.

The Court: There is technically only one stockholder, and that is Sunkist; is that it?

Mr. Strachan: That's right. [3711]

Q. (By Mr. Dixon): Would you say, Mr. Finley, that growers are in a sense comparable to stockholders in corporations for profit?

Mr. Strachan: I object. That involves a legal conclusion. It has nothing whatever to do with direct.

The Court: Sustained.

Q. (By Mr. Dixon): In any event, these operations of Exchange Orange and Sunkist are carried

(Testimony of James A. Finley.)

on for the profit of the growers, are they not, Mr. Finley?

A. Well, yes; they are carried on so the growers can make a profit.

Q. I didn't get your answer.

A. They are carried on so the growers can make a profit.

Q. If there is a profit, then, it goes to the growers?

A. There is no profit by Exchange Orange Products Company, though.

Q. Well, if there is any profit or any money left over after all the expenses have been paid of operating Exchange Orange and Sunkist, what is left goes to the growers each year; is that the theory under which you operate the Exchange Orange Products?

A. I think I testified that we received the fruit, and when we take out——

Q. Can you please answer that yes or no? If you can't [3712] answer it that way, just say so.

A. It is not profit. The money which we have left over goes back to Sunkist for distribution to the growers.

Q. That is where it goes eventually?

A. Sure.

Q. After the expenses are paid?

A. That is correct.

Q. Mr. Finley, I think you testified that 1951 was one of the largest Valencia crops in the history of California Valencia production; is that correct?

(Testimony of James A. Finley.)

A. It was the largest for the by-products plant in the history.

Q. In other words, according to your Exhibit FD —do you have that before you? A. Yes.

Q. That chart, if I read the big black line, indicates the extent to which there were more product oranges available in 1951 as compared to the previous years indicated on the black lines below the line marked 1951; that is correct, isn't it?

A. That's correct.

Q. I think you testified that before the price was set in 1951, that various processors, I think you said, also customers of Sunkist, were contacted with reference to the price at which it would be sold, I mean at which [3713] Valencia oranges would be sold? A. At which Valencia oranges?

Q. Yes.

Mr. Strachan: I don't believe this witness testified on that subject.

The Witness: Mr. Kelly testified about that. I have nothing to do with setting the price of oranges.

Q. (By Mr. Dixon): I understand that. But didn't you testify here, I think this morning, that you knew that the hot concentrate processors could afford to pay $40 a ton for oranges in 1951?

A. I knew that.

Q. And you so stated that you knew that of your own knowledge, did you?

A. I knew what we were selling hot concentrate for, and I knew that they could afford to pay for it.

Q. How did you get this knowledge that the

(Testimony of James A. Finley.)

processors of hot concentrate could afford to pay this price that was established by Sunkist for oranges in 1951?

A. I didn't contact them to see whether they thought they could. I told Sam Kelly that we could, that our prices were that we could pay $40 a ton on that.

Q. So you were basing your statement this morning on your knowledge of the operations of EOP and what it could do with the $40 fruit; is that correct? [3714]

A. Yes, sir; I so testified to that effect.

Q. But you never inquired, yourself, and determined of your own knowledge anything with reference to this matter with other processors, such as Mission and Hyland-Stanford and Bireley's, did you?

A. That is Sam Kelly's responsibility. He was selling them the fruit. Not mine.

Q. You did furnish them some fruit——

A. On a deferred payment plan.

Q. Under the deferred payment plan?

A. Yes.

Q. I think you said that Exchange Orange Products had two or three different types of arrangement with independent processors during the various years 1947 through '51?

A. Yes; we had different types of arrangements.

Q. And those arrangements set forth in Exhibit FE are divided into three groups; is that correct?

A. That is correct.

(Testimony of James A. Finley.)

Q. The first one is that where Exchange Orange furnishes the oranges to the independent processors and pays them for the processing operation and receives the processed product and sells it under the Sunkist label?

A. The Sunkist, or through our Sunkist sales department. It could go under the Exchange label, or any other label. [3715]

Q. And Sunkist has a pretty substantial sales department, doesn't it, Mr. Finley?

A. Yes; it has a sales department.

Q. It is larger, to your knowledge, than any other independent processor in Southern California?

A. Yes; it has more volume of business than any other that I know of.

Q. You have already anticipated my next question.

With reference to the volume of business handled by your sales department, do you know how that compares with reference to your nearest independent processor that might be a competitor of Sunkist in any of the products that you sell and that they sell?

A. I don't know the relative size of the two. TreeSweet, they have a Florida operation, they sell Florida juice in California, but they have one sales department. But to compare the size of the two, I couldn't do that. But I am sure that ours is probably larger.

(Testimony of James A. Finley.)

We have a more diversified line of products, more fields to cover.

Q. In dollar volume in 1951 the total sales of your products department, that is, those processed by Exchange Orange, were approximately twenty-five millions of dollars, weren't they?

A. I don't remember what that figure is. That sounds [3716] a little high and too good to be true.

Q. I think Mr. Armstrong testified, if I recall it, that in 1951 the total sales of fresh fruit and product fruit was approximately $150,000,000, of which about 18 per cent, 17, 18 per cent were of the product fruit, I mean products from the product fruit.

A. I didn't get to hear Mr. Armstrong's testimony.

Q. Do you think, from your own knowledge, that would be about correct?

A. Yes; 16 to 20. 25 seems a little high. But you have a record some place.

Q. So that all of these products that were processed by Hyland Stanford, Harts, and so forth, under the heading "For EOP's Account" on your Exhibit FE, were actually sold through the Sunkist selling organization; is that correct?

A. That is correct.

Q. Then the second type of arrangement that you mentioned was the so-called deferred-payment arrangement with Hyland Stanford and Mission Dry on your Exhibit FE. Now, under the so-called deferred-payment arrangement the processors acquired the oranges at a stipulated price, based upon

(Testimony of James A. Finley.)

the Sunkist selling price, and paid for them after they took the processed product made therefrom from storage or inventory and sold it; is that correct? A. That is correct. [3717]

Q. So under that arrangement the processor did not have to pay for the product oranges at the time they were delivered; is that a fact?

A. That is correct.

Q. And was it necessary for, say, Hyland Stanford and Mission Dry under their arrangement to pay any interest or carrying charges to Sunkist on any amounts that might be due for the fruit purchased under this deferred-payment arrangement?

A. No; there wasn't.

Q. So that no payment was required under that type of deal until the product processed from the oranges was actually sold?

A. Until they withdrew it from the Lawrence warehouse. Not when they sold it.

Q. It is a fact, is it not, in connection with the Hyland Stanford and Mission Dry contracts that you entered into with those companies under this so-called arrangement, that you also required them to take all of their requirements of oranges from Sunkist and to make their processing facilities available to Exchange Orange, if you wanted to use them and they weren't otherwise being used by Hyland Stanford, or the processor with whom you had that arrangement; is that correct?

A. Well, they would process the Sunkist oranges up to [3718] a certain price, after which time they

(Testimony of James A. Finley.)

were released if it went above that, for their protection.

Q. My question, Mr. Finley, is as to whether or not when you made this deferred-payment arrangement with these independent processors, that you also made this second agreement pursuant to which they agreed to make their facilities available to Exchange Orange on call of Exchange Orange, if those facilities were not being used by the independent processor with whom you had this arrangement.

A. Yes, that is correct; to offset the deferred payment. For the favor which we paid them, they would pay us one.

Q. This third type of arrangement, the kind that you had with TreeSweet back in 1947, TreeSweet is the only one that ever had this arrangement, isn't it, Mr. Finley? A. The only one in 1947.

Q. And the only one in 1948? A. Yes.

Q. '49? A. Correct.

Q. '50? A. Yes.

Q. Did TreeSweet ever go into the frozen concentrate business?

A. They did in Florida; not in California. [3719]

Q. Their plant here doesn't produce any frozen concentrate, does it? A. No; it does not.

Q. So, they don't sell any frozen concentrates in this market, processed in their plant here, in competition with any processed by your plant and sold through Sunkist, do they?

A. No. They compete with us with their Florida concentrate.

(Testimony of James A. Finley.)

Q. Do you know whether Silzle sells any—made any frozen concentrates in 1951?

A. No; I am sure they didn't.

Q. And they didn't sell any frozen concentrates in competition with any processed by Exchange Orange and sold in this market and any other states of the country during the year 1951, did they?

A. No; they didn't.

Q. And none of the fruit that was processed under either the TreeSweet or Silzle contracts was sold by TreeSweet or Silzle under the Sunkist label, was it? A. No; it was not.

Q. I believe you stated that no other independent processor had this type of contract up until 1951, except TreeSweet? A. That is correct. [3720]

Q. Under this so-called grower-participation contract, TreeSweet, I think, was paid for the processing operation by Sunkist, was it not? By that I mean it is paid for processing oranges which are made available to it and by TreeSweet processed into single-strength juice, and put into cans with the TreeSweet label?

A. It was paid for the processing and then we got the difference between that and their sales price.

Q. They were paid for the processing?

A. Yes. They were not——

Q. And they didn't have to pay, then, for any oranges that were thus made available to them under this arrangement that had been in effect since 1947?

A. They were not paid for the——

Q. Did they?

(Testimony of James A. Finley.)

A. They did not pay for the oranges until such time as the merchandise was sold, and the processing, they were not paid for that until the merchandise was sold, either.

Q. After the Valencia season was over, there was still considerable canned single-strength juice that was carried in inventory by TreeSweet under the warehousing arrangement, was there not?

A. Yes; there was.

Q. And TreeSweet didn't have to and didn't pay Exchange Orange or Sunkist anything for financing the carrying of that [3721] inventory, did they?

A. They paid for the cans, cases and labels. They did not have to pay for fruit.

Q. I said for financing.

A. That is financing if they pack an inventory.

Q. It wasn't, in fact, necessary, was it, under this arrangement for TreeSweet to finance any inventory factoring of accounts, say, with a bank, by pledging warehouse receipts for loans from a bank to carry on operations until the product thus processed was sold?

A. They told me they had to borrow from the bank for cans, cases and labels, but how much I don't know.

Q. The inventories, as far as you know, Exchange Orange and Sunkist were not paid anything by TreeSweet for carrying this inventory until it was sold by TreeSweet?

A. That is correct. Sunkist was not paid until it was sold.

(Testimony of James A. Finley.)

Q. Now, you said something about how this arrangement got started with TreeSweet back in 1947. Was that a rough year for independent processors financially, do you know, or don't you remember?

A. I don't think it was a rough year for processors. I think it was a good year for processors if they sold at the time of the pack. It may have been a rough year for those that wanted to carry an inventory over into the next [3722] year.

Q. I think you said the reason this arrangement was entered into was because TreeSweet told Exchange Orange or Sunkist that they weren't going to pack any more inventory and carry it and take the risk, shall we say, of a loss or drop in the market by having money tied up in a pack; is that correct?

A. Yes; that is correct. You usually sell your pack from the Valencia season about 60 per cent during the packing season and 40 per cent is carried over into inventory, and they would not be willing to buy fruit for the 40 per cent.

Q. So to permit them to avoid any risk in the dropping of the market price on any inventory that might be carried by TreeSweet, assuming they processed it themselves, this arrangement was entered into with TreeSweet back in 1947, wasn't it?

A. It was.

Q. Did you state at that time to other independent processors that this kind of arrangement was being made available to TreeSweet?

A. No, I did not.

Q. Did you state to any independent processors

(Testimony of James A. Finley.)

in 1948 that you had this kind of arrangement with TreeSweet? A. No.

Q. 1949?

A. No, I did not, not up until 1951. [3723]

Q. And 1950, then, you did not say anything about it? A. No.

Q. They were the only ones that had it during those four or five years, is that correct?

A. That is correct.

Q. It is a fact, is it not, Mr. Finley, that right here in the Los Angeles market TreeSweet outsells Sunkist in single-strength juice and has for a good many years? A. You mean before 1951?

Mr. Strachan: In 1951 and prior?

Mr. Dixon: Yes.

The Witness: We didn't have Sunkist until August, 1951. We had Exchange before that.

Q. (By Mr. Dixon): I am talking about the single-strength juice that was sold.

A. They outsold the Exchange label in the Los Angeles market.

Q. And with reference to those sales, Sunkist sales were about one-fifth of those of TreeSweet during those years, were they not? I am talking now of single-strength Valencia orange juice.

A. Sunkist sales one-fifth of TreeSweet?

Q. About one-fifth of the TreeSweet sales of single-strength Valencia juice here in Los Angeles?

A. Oh, in the Los Angeles market? [3724]

Q. Yes.

A. I don't know. I haven't followed that.

(Testimony of James A. Finley.)

Q. Well, this TreeSweet arrangement that you call grower participation carried, did it not, a substantial part of the operating overhead of TreeSweet when Sunkist paid the processing costs billed to it under these contracts during these various years?

A. It carried its proper share of the overhead.

Q. Under this arrangement with TreeSweet, you generally knew, did you not, where the product that they processed was being sold?

A. We did not follow where they sold it, although in the market I knew that it was being sold up and down the Pacific Coast and eastern markets.

Q. Well, under the two-price system that we are familiar with in this case, you at least, that is Exchange Orange at least new whether, by the selling price paid by TreeSweet when they made the sale, you knew where the product sold by TreeSweet was going?

Mr. Strachan: I object. The witness has testified repeatedly that they did not know what the selling price was.

Mr. Dixon: I ask that the question be answered, if he knows.

The Court: Overruled. If you know.

The Witness: We knew how much we sold to TreeSweet for [3725] at the two-price system and how much went in state. California-Arizona, and how much went out of state, but how much was within the state or out of it, we did not know.

Q. TreeSweet had the option, did they not, or the

(Testimony of James A. Finley.)

right under this arrangement, that if they were selling this juice up in Washington, to get a lower price under the Sunkist selling price, did they not?

A. That is correct.

Q. And Sunkist got the higher price from TreeSweet when TreeSweet was selling the juice within the states of California-Arizona, did they not?

A. That's right.

Q. So that to that extent you knew where the sales were being made by TreeSweet, did you not?

A. I personally did not know. The money would come in and the accounting department would handle that. I don't know as it was ever compiled for how many cases were in state and how much out. We were more interested in dollars and what was being sold.

Q. You knew, did you not, during this entire period when this arrangement was in effect with TreeSweet, including the year 1951, that the TreeSweet selling prices as published in their bulletins to the trade, were the same as those of Sunkist or Exchange as it used to be prior to 1951?

A. It would vary, I would say. It wasn't always the [3726] same, not necessarily. I don't know what their prices were except through brokers and our own sales department. We never received any of TreeSweet's bulletins. I don't know that they have one.

Q. That was a matter, then, that was handled by your sales department. Mr. Henderson, was it? Thompson?

A. Thompson in 1951.

(Testimony of James A. Finley.)

Q. Now, you have referred in your testimony, Mr. Finley, to the fact that Valencia oranges were, I think you said, in short supply in 1951. By that you didn't mean that there was any less amount of oranges available in 1951 than in prior years in view of your previous testimony, did you?

A. No, not at all. There was more. But when I reported short supplies, why, it would be with the outside processing arrangements we would have shorter supplies at EOP at Ontario than normal.

Q. By short supply, you said something about the Valencias became in short supply, you mean as the season went on there became fewer and fewer tons available for processing, is that correct?

A. Well, what do you refer to, that I said short supply?

Q. It is a fact, is it not, Mr. Finley, if you will refer to Exhibit FD, that there was more fruit available in all months during the processing season in 1951, up to and [3727] including the beginning of the second week of November of that year, 1951?

A. Yes. The chart shows there was more fruit each week.

Q. So you don't want this jury to believe that there was any shortage or the fruit was in short supply for general processing purposes in that year, do you?

A. No, not for general purposes. The reason I asked the question is, where did you get the short supply, because I would report to the board monthly and, of course, in the report, if a question came up,

(Testimony of James A. Finley.)

I would say we have got short supplies this week of fruit, meaning that the outside facilities were going efficiently and EOP company at Ontario was probably shorter, and we could handle more fruit, and encourage the packing houses to go ahead and get more fruit in.

Q. The Exchange Orange processed about twice as much Valencia oranges into single-strength juice in 1951 than in the previous year 1950, did they not?

A. Twice as much into single-strength juice?

Q. Yes.

A. Exhibit CH shows 460,000 cases 1948-49, 210,000 in 1949-50, and 400,000 in 1950-51. so 1949-50 was a freeze year and we did not pack very much because we were not satisfied with the quality of the juice.

Q. Well, there was, in fact, twice the tonnage of [3728] Valencia oranges processed by Exchange Orange in 1951 than was processed by Exchange Orange into single-strength Valencia orange juice in 1950, wasn't there, Mr. Finley?

A. That is true, but still that is below what we processed four or five years previous, so it was not what I consider a large pack.

Q. So when you said that you talked to Mr. Winckler of Winckler & Smith at a time in September when, I think you said you were cutting down TreeSweet and Silzle in half, you didn't want this jury to believe there was less fruit available to Exchange Orange for all processing purposes in Valen-

(Testimony of James A. Finley.)

cia orange juice or other products, did you, than in previous years?

A. We had just about half the fruit available, or less than that, for single-strength juice, and we tried to keep our frozen facilities going, so we cut them one-half.

Q. Again, with reference to FD, that isn't what your figures show generally, is it?

A. This is total receipts.

Q. I am not talking now about total.

A. Total receipts.

Q. At that time you said, I believe, that this was the first time that Mr. Winckler told you that he knew about this, what you call this grower participation agreement with TreeSweet and Silzle, is that correct? [3729]

A. That is the first time he ever told me he knew we had it, was about the middle of September.

Q. Did he refer to it by that term?

A. No. He just referred to it by some kind of a participation or joint arrangement plan. He did not have any name for it at all. He didn't know.

Q. You hadn't told him about any of the details of this arrangement before, had you?

A. No, I hadn't, because I did not——

Q. And you hadn't told any other independent processor about this kind of a deal that was available to TreeSweet, had you, even at that time?

A. I told all the customers of Sunkist the previous year about the deal in 1951.

Q. I think you testified something about con-

(Testimony of James A. Finley.)

tacting Case-Swayne and they told you they weren't interested in 1951. Did you present to them at that time, Mr. Finley, a copy of the kind of contract that you then had had with TreeSweet in 1951?

A. No, I did not. They were not interested in seeing it.

Q. Did you tell them that you had had that kind of a contract?

A. I told them I had a contract and we could sit down and work on it if they were interested, but they were not interested in going any further with it. [3730]

Q. Did you tell them all the details of the proposition that you had in mind and which you subsequently put into your TreeSweet contract?

A. I told them enough so that they could make up their own minds.

Q. You said that the 1951 contract with TreeSweet was, I think you said, basically the same as the one in 1950. There were some differences, weren't there?

A. Yes, there were some differences, refinements.

Q. And one of those differences was that in the 1951 contract you gave TreeSweet a seven cent per case allowance for advertising purposes, isn't that a fact? A. That's right.

Q. That did not appear in any of your previous——

A. It did not appear in any previous one. 1951 was the first one we had Sunkist and Exchange, one

(Testimony of James A. Finley.)

being an advertised brand and another an unadvertised brand, so we set the seven-cent differential.

Q. TreeSweet did not advertise any Sunkist product with this money?

A. They used that seven cents to advertise TreeSweet or to do anything they wanted to with the seven cents.

Q. You don't know what it was used for?

A. I don't know.

Q. They were not required under this arrangement that [3731] you made with them in 1951 to use it for advertising purposes, were they?

A. No, they were not required to use that for advertising purposes. They were selling lemon juice, which is very popular with them, and grapefruit juice, and all that, and they advertised the name TreeSweet more than they did any one item. They advertised the name, and advertising TreeSweet lemon juice is good for advertising TreeSweet orange juice.

Q. I think you testified something with reference to this 1947 arrangement you had with Winckler & Smith. We went into that, I think before. But I don't think you stated at that time that you dumped this down the sewer.

A. Dumped a couple of batches down the sewer.

Q. A couple of batches. Did you ever tell anyone at Winckler & Smith that you were dumping what they had processed down the sewer?

A. We didn't dump it down the sewer until the contract was over and they were paid.

(Testimony of James A. Finley.)

Q. Did you ever take it up with them at that time? A. No, we did not.

Q. Did you ever ask them to make good for any of this that you dumped down the sewer?

A. No. They were in bankruptcy by then.

Q. So that you never let them know or anyone at Winckler & Smith, until this case? [3732]

A. Not that I know of.

Q. That you had, as you say, dumped some of this down the sewer. How many cases or cans was it? A. In barrels.

Q. A couple of barrels?

A. No. It was made up in about 500-gallon batches. We dumped about two batches down the sewer.

Q. Now, you said something about Citromats. Have you ever been inside of Winckler & Smith's plant, Mr. Finley? A. Yes, I have.

Q. When was the last time you were in the Winckler plant?

A. I think I was in there during their bankruptcy in 1948, the winter of 1948.

Q. You mean while it was being operated by the receiver or trustee?

A. The year the receiver operated it.

Q. But you haven't been in there since, have you? A. No, I haven't been there since.

Q. Did you know as a matter of fact that there was a de-oiler attached to the Citromat equipment in Winckler & Smith's plant?

A. Yes. I heard they had a de-oiler. The year

(Testimony of James A. Finley.)

they put it in, somebody said they put it in and were having trouble with it. [3733]

Q. You never inquired of Winckler & Smith about it or how it worked?

A. I know how de-oilers work. I did not have to ask them.

Q. I assume that you know all about it, of course, but I am asking you the question. Did you ever inquire of Winckler & Smith or anybody at that plant how it operated or how it worked?

A. I never asked them, no. [3734]

Q. You were satisfied that no equipment of that type could possibly work on a Citromat, is that correct?

A. It would not make a satisfactory juice, with Citromat juice, I am satisfied of that in my own mind.

Q. The Silzle contract wasn't quite like the TreeSweet contract, was it?

A. No; Silzle is a different type of organization, so the contract is a little different.

Q. Did they have as big a sales organization as Winckler & Smith?

A. I don't know how large a sales organization Winckler & Smith has, but I would say relatively they are probably about the same size.

Q. They got 12½ per cent, didn't they, instead of 15 per cent?

A. Yes. They did mostly business with private label people, so there is less brokerage to pay.

(Testimony of James A. Finley.)

Q. No Sunkist labeled products were sold by—I withdraw that.

None of the products processed by Silzle under its contract with Exchange Orange in 1951 was turned over to Sunkist for selling, was it?

A. No, it was not.

Q. So that all of the juice, single-strength Valencia juice, processed by Silzle under its contract with Exchange [3735] Orange in 1951, just like the TreeSweet arrangement, were sold by Silzle itself?

A. That is correct.

Q. And under any labels that they wanted to put on them? A. That is right.

Q. This was California juice, wasn't it?

A. Yes, it was.

Q. Do you recall what year TreeSweet returned more to Exchange Orange than it got from the sale of fruit through Sunkist?

A. It was '49 or '50, it was one of those years, in that area. I don't remember the specific year.

Q. But during 1950, which was a year in which there was a lesser production or lesser availability of Valencia oranges to independent processors, TreeSweet got more, did they not, than the previous year, for processing?

A. 1950 they got more than in 1949?

Q. Yes.

A. I think they got about the same.

Q. About the same?

A. I haven't got it in front of me, the total for the year. I have just got it by the weeks. They

(Testimony of James A. Finley.)

were considered around a sixteen to twenty thousand-ton plant, 16 to 25. I thought it was in the same range those two years. [3736] I don't remember.

Q. I think you testified, Mr. Finley, that this so-called grower participation contract that you had with TreeSweet all these years, you would not have made a contract of that type with any other canner except TreeSweet; is that correct?

A. In 1951 I would not have made that with any other canner, because they carried the inventory, and the others I sold just on a monthly basis, and at the time of production. And I didn't know enough about their sales department, their organization, to have done it.

I had five years' experience with TreeSweet and I knew more about them at that time.

I could have taken Case-Swayne, and maybe with a year's experience with them, maybe later would have done it. But I never had the experience.

Q. I take it you didn't offer them the same kind of a deal in 1951 that you did TreeSweet?

A. We never got down to that much discussion, because they said they didn't want it.

Q. So, under no circumstances, then, would you have offered a contract, or any arrangement, to any other independent processor comparable to that which you made available to TreeSweet in 1951, in that year; is that correct?

A. Yes, sir, that is correct. [3737]

Mr. Dixon: That is all.

(Testimony of James A. Finley.)

Mr. Strachan: May I hear that question, please?

The Court: Read it.

(The last question and answer thereto were read by the reporter.)

Redirect Examination

By Mr. Strachan:

Q. As I understand it, that answer means that you didn't regard any processor as being comparable to TreeSweet in its ability to produce and market the product; is that correct?

A. Produce and market.

Mr. Dixon: Just a moment. Is that a construction of his answer, your Honor, by this witness?

This is redirect, I know——

The Court: It is a leading question, but the objection is overruled.

Q. (By Mr. Strachan): When you said that the volume handled by the Sunkist sales department exceeded the volume of sales of TreeSweet, did you intend that to apply to the volume of single-strength orange juice sales?

A. No. The volume of single-strength orange juice sales—TreeSweet is normally a 600,000-case plant, and we run about 400,000 cases, and their sales department, we [3738] wanted the use of their sales department, they have a larger sales department than we have, when it comes to the sales of single-strength juice. So we used theirs.

Q. I think you said——

(Testimony of James A. Finley.)

The Court: You said you used theirs?

The Witness: Used their sales department and processing facilities. We didn't use it, but I mean——

The Court: Under the contract?

The Witness: Under the contract.

Q. (By Mr. Strachan): One of your objects in entering into this agreement with TreeSweet was to have available for the marketing of the growers' oranges the TreeSweet trade name, sales organization, and marketing potential; is that correct?

A. That is right.

The Court: Just a minute.

Mr. Dixon: If the court please, I think that question is obviously leading, a conclusion, and a matter for the jury to determine.

The Court: Sustained.

Q. (By Mr. Strachan): Were there any other considerations other than getting the oranges processed that led you to enter into the contract that you did with TreeSweet?

Mr. Dixon: I object to it, your Honor. It has been gone into fully on direct examination, and this is redirect. [3739]

The Court: Overruled.

Is there something new and different?

Mr. Strachan: It arises out of the last question that Mr. Dixon put.

The Court: You covered this all on direct, did you not?

Mr. Strachan: I want to clarify this thing, after

(Testimony of James A. Finley.)

the inference that Mr. Dixon's last question left with me, at least.

Mr. Dixon: The inference is that which is to be drawn by this jury, not to come from the mouth of this witness.

Mr. Strachan: I don't want it to come from Mr. Dixon's mouth, either.

Mr. Dixon: It is for the jury to determine.

The Court: I will sustain the objection. This has all been covered. Redirect is to take care of new matters brought out in cross.

Q. (By Mr. Strachan): Under the arrangements made with TreeSweet and Silzle, were those processors free to sell the product made under those arrangements at any price they saw fit?

A. They could sell at any price they saw fit.

Q. Did you know any more about the actual prices quoted by TreeSweet or Silzle than you learned about the prices of any other competitors in the market? A. No, I did not. [3740]

Q. I think at one point you said that TreeSweet and Silzle didn't pay for the canned juice until it was sold. They paid for it when they drew it out of stock, isn't that correct?

A. That is correct.

Q. When they purchased it, rather than when they sold it, that they paid the price? A. Yes.

Mr. Dixon: What is that, counsel? I don't think this witness so testified at all, your Honor.

Mr. Strachan: That is the fact, isn't it?

Mr. Dixon: I move the answer be stricken.

(Testimony of James A. Finley.)

The Court: Read the question and answer.

(The record was read by the reporter.)

The Court: Isn't this covered in the contract?

Mr. Dixon: It is, your Honor.

The Court: Doesn't the contract provide expressly what the situation is?

Mr. Strachan: That is right. But Mr. Dixon asked the witness, "Then they didn't pay for the juice until it was sold?" and that is directly contrary to the fact, as shown by the contract. I just wanted to clear that up.

The Court: The jury will have the contract. They can read the contract.

Q. (By Mr. Strachan): As I understand it, you had no [3741] business dealings, nor business negotiations, with Winckler-Smith Company, or Mr. Winckler, after the fall of 1947, until the two conversations you have testified to in 1951?

Mr. Dixon: If the court please, I think this is, again, going over something that has already been covered.

The Court: Counsel is almost through. Objection overruled.

Did you or did you not?

The Witness: I did not have any business dealings with him after that time. [3742]

* * *

The Court: Let the record show the jury absent.

Mr. Stark: We have some exhibits, your Honor, which have been identified and not offered, and

some exhibits which have been offered and as to which we desire to make a reoffer. We thought possibly in the absence of the jury we could proceed with this and then simply inform them.

The Court: All right. [3749]

* * *

The Court: Received in evidence, Exhibit FG.

(The exhibit referred to, marked Defendants' Exhibit FG, was received in evidence.)

Mr. Stark: As to the documents which were identified primarily in the course of cross-examination of Mr. Winckler [3750] and Mr. Hodge, the first is Exhibit A, the file of the Winckler & Smith corporation application from the Corporation Commissioner's office. You will recall that Exhibit A is the entire file. Exhibits A-1, A-3, A-4, A-5 and A-6 have already been received in evidence. At this time the defendants would offer Exhibit A, and for clarity Exhibits A-2 and A-7. These are all part of the Exhibit A, but I think probably they should remain identified separately.

The Court: I don't understand. Are you offering all of A?

Mr. Stark: Offering all of A, yes, the entire file. [3751]

Mr. Dixon: If the court please, I certainly object to the introduction of the entire file. I haven't even see it. It seems to me——

The Court: It is the file of the application before the Corporation Commissioner, and in my opinion would obviously contain a lot of material

that would have no bearing. I will sustain the objection to the entire file.

Do you have other parts of it you want to offer?

Mr. Stark: Then we would offer Exhibit A-2, which is the Winckler & Smith balance sheet of January 31, 1949.

Mr. Dixon: I might say, your Honor, I don't have a copy of that.

The Court: Then supply copies later if it goes into evidence.

Mr. Dixon: I have no objection to it.

The Court: All right. A-2 received in evidence.

(The exhibit referred to, marked Defendants' A-2, was received in evidence.)

Mr. Stark: And A-7, which was the covering letter on the audit of January 31, 1946.

The Court: That is just a two-paragraph letter?

Mr. Stark: Yes.

Mr. Dixon: I don't have a copy of that, either.

Mr. Stark: It is the covering letter on A-1.

The Court: Here is the letter. It is two paragraphs. [3752] You can read it.

It is the covering letter for which balance sheet?

Mr. Stark: For A-1, for the balance sheet of January 31, 1946.

The Court: All right. A-7 received in evidence.

(The exhibit referred to, marked Defendants' Exhibit A-7, was received in evidence.)

Mr. Stark: Exhibit B, which is the Hodge audit of January 31, 1951. is offered in evidence.

Mr. Dixon: Again, counsel, I am sorry, I don't have a copy. Is it the same thing that is already in evidence?

Mr. Stark: Mr. Dixon, I wonder if it would inconvenience you if you can work here. I have a set of these exhibits. We can both look at it.

The Court: Look at it over there, Mr. Dixon. And if they are received in evidence the defendants will furnish a copy.

Mr. Dixon: Is that already in evidence now?

Mr. Stark: It is identified, yes.

Mr. Dixon: What was it, again?

The Court: B.

Mr. Stark: B. Was Exhibit B admitted, your Honor?

Mr. Dixon: I have no objection to it, as long as it is part of the Hodge report.

The Court: Exhibit B received in [3753] evidence.

(The exhibit referred to, marked Defendants' B, was received in evidence.)

Mr. Stark: And Exhibit C is the same type of document. It is a financial statement of July 31, 1951. It is offered in evidence.

Mr. Dixon: No objection.

The Court: C received in evidence.

(The exhibit referred to, marked Defendants' C, was received in evidence.)

Mr. Stark: Then Exhibit D is the contract of August 27, 1948, between the receiver Lynch and

Exchange Orange Products Company. The defendants offer that in evidence.

The Court: Offer it now?

Mr. Stark: Yes.

Mr. Dixon: Do we have a copy of that somewhere?

Mr. Stark: It is my recollection that copies of all these were furnished at the time that they were identified.

The Court: Not the "A" exhibits.

Mr. Stark: Not the "A" exhibits.

The Court: Nor B or C, financial statements. This might have been. Check on that. If not, furnish a copy.

Mr. Dixon: We don't have it, I am informed.

The Court: Furnish a copy. Exhibit D received in evidence.

(The exhibit referred to, marked Defendants' D, was received in evidence.) [3754]

Mr. Stark: Exhibit E, which is the letter of October 29, 1948, from the receiver Lynch to the Exchange Orange Products Company, is offered in evidence.

Mr. Dixon: We don't have a copy of it, but I do remember something about the letter, your Honor. I think it would be wholly irrelevant to any of the issues of this lawsuit, what the receiver said or didn't say.

The Court: Let's see the letter. I haven't a copy, either.

(Clerk handing exhibit to the court.)

The Court: Here is the letter, if you want to look at it.

Mr. Dixon: Thank you. Well, I would object to it on the ground it is irrelevant and immaterial, doesn't tend to prove or disprove any of the issues of the lawsuit, your Honor.

The Court: It shows the amount of the contract.

Mr. Dixon: That is already provided for in the contract which is in evidence.

The Court: Objection sustained.

Mr. Stark: Your Honor, may I state a further ground of materiality? May I be heard on this? One of the charges involved here is a conspiracy or attempt to put this plaintiff out of business, and this letter written by the receiver, the court officer in possession for the plaintiff, indicates that in a period of severe financial difficulty the defendants, rather than attempting to put the plaintiff out of business, actually entered into the contract and performed to the [3755] satisfaction of the Trustee.

The Court: Well, it is the Trustee's characterization of the matter, and you are offering it apparently for the truth of what the Trustee says. If it was written by Winckler & Smith, it would be an admission. Written by the Trustee, it is not. It is a third party's characterization. It is like a schoolboy writing to his teacher, "This is a very fine thing for EOP to do."

I don't think it hurts and I don't think it helps, but I am trying to cut down the number of exhibits. Objection sustained.

Mr. Stark: May the record show it is also ma-

terial, apart from the truth of the contents, as impeachment of the testimony of Mr. Winckler that the dealings in this case, in the case of the 1948 contract, were between him and the Trustee, that being of some significance in view of Mr. Finley's position that after the 1947 agreement he did not thereafter deal with the Winckler-Smith corporation?

The Court: It may be offered also for that purpose and the objection is sustained.

Mr. Stark: The next exhibit which has been identified and which the defendants at this time offer in evidence is Exhibit F, which is the tax returns, Federal and State tax returns of the Winckler & Smith Corporation.

The Court: Weren't they offered once [3756] before?

Mr. Stark: So far as I know, they have not been offered in evidence and they are not in evidence.

Mr. Dixon: I will object, your Honor, to the offering into evidence in this case of any tax returns of this corporation. I don't think they are relevant or material to any of the issues of the lawsuit. I think the only tax return that I can remember that is in evidence at all, for a limited purpose, is that to rebut an issue raised by the defendants as to the two types of appraisals or the two different methods of appraising this property, which are set forth in the tax return, and which were offered for that purpose only.

The Court: Objection sustained. It is sustained upon the ground that the computing of Federal tax

returns is on a basis under the Federal tax statute and does not necessarily follow the same methods that a company would in its set of books. There has been an examination of the financial returns, there have been computations made, adjustments made by the defendants of what they thought the financial reports would show, and it would inject further issues in the case with little, if any, effect upon the ultimate issues of the case.

The objection is sustained.

I think I have already gone over this matter, and wherever I refer to it in the record, I incorporate whatever remarks I then stated about Federal tax returns.

Mr. Stark: In that regard, your Honor, we have attempted, [3757] as you are aware, the transcript is rather voluminous, to determine whether there has been prior discussion on a particular point and not to repeat it. I will attempt not to do so. I was not aware that there had been.

The Court: It has been discussed, and I said something at that time like what I say now, that then we would have to go into informing the jury about the statutes under which the return was made, and why the return was made in a certain way that might be different from the way a financial set of books were kept, and you would have a whole series of issues then on a matter that adds nothing. That is what I have in mind. The next one is what? G? [3758]

* * *

Mr. Stark: The next is Exhibit J, and as to that,

your Honor, that is the book which was somewhat thicker than this, it was described in the testimony as a summary of fruit receipts and production records. The book which has been marked contains photostats of some other records, and we have checked this and find that starting with the page marked in pencil 206 it is the beginning of the production records. We should like permission to physically—to have the clerk physically take the pages ahead of 206 out of the book, and as so abbreviated we would offer Exhibit J in evidence.

Mr. Dixon: If it is what I think it is, and I haven't yet had a chance to go over it, I would object to it on the ground that it is irrelevant and immaterial to any of the issues of the lawsuit. [3760]

What is it offered for, counsel?

The Court: It runs from 206 to how far?

Mr. Stark: To the end of the book, which is—these are page numbers which I believe were put on for photostat purposes. It runs to 306 inclusive.

Mr. Dixon: They appear to be photostats.——

Mr. Stark: They are photostats of the original ledger sheets.

Mr. Dixon: On counsel's representation, it is enough for me, but I don't see any relevancy to them.

Mr. Stark: The relevancy of these production records, among other purposes, is that they contain the actual daily production records which are material to the testimony and the issue as to what Winckler's production capacity and what his utilization—rather, what his utilization of production

capacity was throughout the period involved in the lawsuit, which is directly material to the damage issue insofar as there is any question of the amount of fruit he did or could have run had he had fruit available in 1951 under this contract, or otherwise.

The Court: Didn't you have summaries made of such material as you were interested in from these?

Mr. Stark: Not of this record, no. We have fruit receipts, but not the production record. The record gives the production by product, by days, can sizes, and so forth, [3761], and is the only complete picture of Winckler's—not his theoretical capacity, but his actual utilization of facilities during this period.

The Court: The record doesn't show what use you want to make of this, there is no chance for rebuttal; the last day of the trial you want the original records put in, which leaves the matter wide open as to what issues might be raised.

Mr. Stark: I believe, your Honor, I have stated the issue for which we propose to use the document. If, in fact, it is used before the jury it will be used on that issue of the actual production record of Winckler & Smith during the period.

Mr. Strachan states that we have no present intention of referring to this exhibit before the jury, but we do feel that it is a part of the record which we should have available.

The Court: It has been available, and so far the only reference to it was on page 292. The only reference made to it in the transcript is on page 292.

Mr. Stark: I believe that is correct, your Honor.

The Court: Now, the last day of the trial the

matter is offered, when you have had chances to make summaries, and have made summaries—for instance, you just offered one of fruit received, and there are numerous other exhibits [3762] which you have made. What is the plaintiff's objection?

Mr. Dixon: Plaintiff's objection——

The Court: Or is there objection?

Mr. Dixon: Yes, there is definitely, your Honor.

I frankly don't know what these hundred or so, or how many pages there are in here containing literally thousands of figures might mean or be used for.

I submit that the record in this case is already replete with statistical information on production, the type of production of the plaintiff. And counsel said they don't intend to use this before the jury. If it isn't for use before the jury, it seems to me it is wholly irrelevant and I object to it on the grounds that coming at this stage I don't know what use could be made of it. [3763]

Mr. Stark: May the record show that this exhibit has been identified and available since the 3rd or 4th day—no, I correct that—since the early part of Mr. Winckler's cross-examination. It is offered not only on this issue, but is offered as statistical material from the plaintiffs' records, from records which the plaintiff not only had in his possession, but actually furnished to the defendants, and that it constitutes the original record. As I understand, there is no objection to the foundation.

Mr. Dixon: No, counsel, but if everything that was furnished——

The Court: Sustained upon the ground that defendants have had this sheet apparently photostated since long before the trial of this action, and that during the trial reference was made only to page 292, that defendants now disclaim any intention to use anything in it for argument to the jury, that it involves pages and pages and conceivable issues that would take considerable time to determine, and that plaintiff should have a right to have attention called to whatever matters were going to be referred to. Again 292 was the only page to which any reference was made.

Further, that they are not complete records. 206 starts out with a date in June of 1948 and then jumps from there to July of 1949.

Mr. Strachan: That is the period the company was in [3764] receivership, your Honor.

The Court: June, 1948, and jumps to July, 1949. It would add nothing to the summaries which the defendants have already offered in evidence and which they have had opportunity to offer in evidence. Objection sustained.

What is the next one?

Mr. Stark: The next is Exhibit K, which was the minutes of the special meeting of the board of directors of the plaintiff on June 24, 1949. That is the minutes relating to the forgiveness of indebtedness and related financing, and the defendants offer that exhibit in evidence, and probably to be considered as a companion exhibit with it, Exhibit L, which was the waiver of notice from the minute books covering the same meeting of June 24, 1949.

The Court: Is there an exhibit of the meeting held in January or prior to the termination of the receivership?

Mr. Stark: January 18, 1949, is the next exhibit I had in mind, which is AY.

The Court: AY?

Mr. Stark: Yes: That is the minutes relating to the Rubin sale, and we propose to offer those minutes, also. In fact, we will offer those so that the court may consider K, L and AY.

The Court: That meeting was January 18th?

Mr. Stark: AY is the meeting of January 18, 1949. [3765]

The Court: May I have that, Mr. Clerk?

Is there any exhibit in evidence as to any of the orders made in that reorganization proceeding? I have heard you gentlemen argue here. I have never looked at any of that court file. Plaintiffs apparently rely on some matters that occurred during the Chapter XI proceeding, and you rely on some matters that occurred after the Chapter XI proceeding. Has anybody taken the trouble to go and look at the court file?

Mr. Stark: Yes. I think the court file has been examined. There is, in fact, considerable testimony in the record through Mr. Lynch regarding his examination of the court file. There may be a statement or two by Mr. Fisher. Neither ourselves nor the plaintiff has offered any part of that file so far as I am aware. We don't propose to.

Mr. Dixon: Your Honor, there is, if I understand, or was an order made by the Trustee in the

Chapter XI proceeding conditionally confirming the sale, dated February 14, 1949, by David Head, Referee in Bankruptcy. I suppose we had better mark it for identification.

Mr. Stark: May we see that?

Mr. Dixon: Yes.

The Clerk: Plaintiffs' Exhibit 84 for identification.

(The exhibit referred to was marked Plaintiffs' Exhibit 84 for identification.) [3766]

Mr. Dixon: Which relates to this sale and plan of reorganization pursuant to which the sale was made, which, if these other documents are to go in, probably should accompany it so that the complete record is available on this point. We don't like to encumber the record further with documents, but if these others are to go in, I would say that the Plaintiffs' Exhibit for identification 84 should be offered. This exhibit is excerpts from the order, and we will put in the whole order if counsel wants this.

Mr. Fisher: Let's see it.

Mr. Stark: Exhibit 84, as to that may any ruling be reserved until we have had a chance to inspect it, and if a portion of the record is to go in, perhaps we will want to offer some part of that record, too. There has been none offered before or identified, so we did not plan to go into it.

Mr. Dixon: We were waiting to see whether this was to go in.

Mr. Stark: I believe K, L and AY, however, are minutes from the corporate records which can, in

light of the testimony in the case, stand on their own merits apart from the amount of the record in the bankruptcy proceeding which would be offered. We accordingly offer K, L and AY.

The Court: Have you seen AY?

Mr. Dixon: I am not sure, your Honor. I don't have [3767] copies of any of these.

The Court: I am willing to give you time to work out what might be agreeable as to 84, that is, how much of the order. Plaintiff has merely excerpted parts of the petition and order. But I will admit some kind of an order in that connection. While I am telling the jury about K, L and AY, I want to tell them also about 84, even though we haven't agreed to the form of it at that time.

As I understand your point, there is no objection to parts of that file, but it is a question of how much you want or how little we can get by with. Is that it, Mr. Stark?

Mr. Stark: It is a question of, if we are going into the file, we want a complete picture of what is in the file. I personally have not reviewed the file. I have talked to Mr. Lynch and Mr. Fisher regarding their review of the file.

The Court: All right. K received in evidence. L received in evidence. AY received in evidence.

84 will be received in evidence when the form of it is agreed upon.

The Clerk: You reserve the admission, however, until later?

The Court: Yes.

The Clerk: K, AY and L.

(The exhibits referred to, marked Defendants Exhibits K, AY and L, were received in evidence.) [3768]

Mr. Stark: 84 is not received, but an exhibit of that type will be received?

The Court: It will be received when we can agree upon the form of it. [3769]

* * *

Mr. Stark: The next three exhibits are in a somewhat different group. They relate to the testimony of Mr. Marvin Walker from the Florida Citrus Canners Co-Operative. The first is Exhibit BU.

BU is——

The Court: B?

Mr. Stark: B as in Betty.

The Court: Let me find my notes here.

Mr. Stark: BU is a graphic representation of the price pattern on Florida unsweetened orange juice, which was testified to in the record by Mr. Walker.

We offer this as a graphic representation of that testimony.

Mr. Dixon: Counsel, I am sure you gave it to us, but I don't seem to be able to find it right at the moment.

The Court: Here is what it looks like, Mr. Dixon.

Mr. Dixon: Yes, he has just shown me what he has referred to. Thank you.

Mr. Stark: Defendants offer BU in evidence.

Mr. Dixon: I don't see that it has any relevancy

to the issues of the case. It is cumulative to say the most.

Mr. Stark: It was our thought that particularly insofar as his testimony related to trends——[3772]

The Court: BU received in evidence. [3773]

* * *

EX received in evidence. EX has the single sheet as previously identified, and two large photostatic sheets. [3777]

* * *

The Court: Magazine, newspaper, car cards, posters—pardon me—radio, $472; television, $17,000.

Well, let's save time. Can it be stipulated, Mr. Dixon, that if a witness were called from the accounting department [3783] of Sunkist, that he would testify in substance that his job was to make what might be well called a cost accounting on advertising expenditures, and that these records attached to EX represent his cost accounting between various products, and that EX is a summary, and that the matter—if you want to even it up—on cross-examination he would admit that this was a matter of his judgment as to how the accounting should be distributed.

Mr. Dixon: We will so stipulate to save time. Is there anything else you wish, counsel?

Mr. Stark: The only thing that bothers me a little bit, your Honor, is the implication, if there could be one drawn, that there was an element of judgment in determining what product is adver-

tised. There is an element of judgment in any cost allocation of general items, but whether or not you advertise a particular product on the radio or in a newspaper doesn't involve the element of judgment.

The Court: As to certain items, there wouldn't be judgment. I am just trying to save some time. If he was here on cross-examination, I would imagine if he was asked that question he would have to admit that the matter of judgment was involved. Certain items there wouldn't be much problem about, and on others he would have to use his judgment as an accountant or bookkeeper in making the cost accounting.

Mr. Stark: The only thing I was wondering was if it [3784] would be possible to add, judgment as to those matters which required allocation.

The Court: All right. That's satisfactory. And then call attention, for example, that as far as TV was concerned—well, I don't know. If we get into this, this is argument. If I was plaintiffs' counsel and you argued this matter, that there was 15/100ths of one per cent for single-strength juice, I think I would be able to make quite an argument that you are advertising the Sunkist name even in connection with other products and spent these figures, $64,000, and that certainly there was a slop-over value for every other Sunkist product.

Mr. Stark: I think that is certainly arguable from the exhibit as it stands, your Honor, without a need of explanation.

The Court: That's right. I am not suggesting that to the jury, but it is one of these exhibits—

what do you get out of it? If you take the trouble to argue and pinpoint the 15/100ths of one per cent, and if there is time—query—probably there will be the argument on the other side, then, and you would have to come back and rebut it.

Mr. Stark: I will be frank, your Honor, I was surprised when I saw that 15/100ths of one per cent myself.

Mr. Dixon: So was I.

Mr. Stark: The way I feel about it, it doesn't matter [3785] how much you blow up 15/100ths of one per cent, it is a pretty insignificant thing.

The Court: All right. Are you satisfied, first, to stipulate if the witness was called—Mr. Dixon, are you satisfied if the defendants called a witness, he would testify substantially as I have indicated?

Mr. Dixon: Yes, the plaintiff is satisfied.

The Court: Are you, Mr. Stark?

Mr. Stark: Yes. Could you indicate this was a record kept in the usual course of business? I mean it is not a record prepared for this trial.

The Court: All right. The exhibit is again received in evidence. It was already received in evidence.

I will try to flag it to say something about it and not say too much, and then if you fellows want to argue more about it, you can.

What is the next one?

Mr. Stark: The next series, I believe we can take in a group and dispose of fairly quickly, your Honor. That is related to exhibits which have previously been offered and rejected, and as to which

we wish to clarify the offer and to reoffer them for purposes of clarifying them.

The first is Exhibits I-1, I-2, I-3, I-4, CM and CN. Those are the laboratory analyses and the two exhibits which were introduced in connection with the offer of Mr. Higbee's [3786] testimony. I don't wish to repeat the long argument that we had relating to the original offer, but I would like to extend their purpose, and the purpose for which they are offered as corroboration of the testimony similarly offered yesterday as to what Mr. Finley would have testified to with regard to his computation and determination of watering of the juice, and his analysis of these laboratory records, and once again to state that we feel in total that these exhibits show a consistent operation in violation of public policy, which precludes the plaintiff from the protection of the antitrust laws.

With that short addition to the statement, we would reoffer those exhibits.

The Court: You may call the objections heretofore made? May those objections be incorporated?

Mr. Dixon: Yes, your Honor.

Mr. Stark: Yes.

The Court: Objection sustained without commenting at length. The public policy problem was not plead. The defense of violation of the food and drug laws was not plead. This type of matter was not raised as an issue, was injected in the last few days of the case, and for all the other grounds stated, the objection is sustained.

Mr. Stark: The next short series of documents

which were previously offered and are now being re-offered are the [3787] exhibits introduced in connection with Mr. Lynch's testimony and Mr. Regan's testimony. First of all, as to Exhibit BA, the allocation of the partners' interests in connection with the write-up of the assets.

The Court: All right. The same——

Mr. Stark: May I just clarify the purpose of our offer in that regard? We feel that the write-up insofar as it relates to plant value is material to the issue of damages, that the allocation between the partners is material to that issue, because it tends to show that the write-up was not for the purpose of a bona fide reappraisal of the value of assets, but rather was for the collateral purpose of wresting control of the corporation by Mr. Winckler from the other stockholders, and, accordingly, it tends to impeach the validity of the write-up. [3788-9]

The Court: Objection sustained, on the present state of the record, and as an additional reason for sustaining it, it is now only cumulative in view of all the evidence in the record.

We are incorporating the prior objections.

Mr. Dixon: May the record show at this time, if I fail to make an objection to these exhibits that have already been passed upon, that I am renewing my objections as they are reoffered, on the same grounds already stated and in the record?

The Court: All right.

What is the next one?

Mr. Stark: The next is perhaps something that I should have some clarification on.

BH and BJ, particularly as to BH, was the summary of the cost of the lease and repurchase of the plant. BJ, you recall, was the summary of earnings, which was a comparison between the Hodge figures, the prospectus figures, and Mr. Lynch's figures.

Your Honor indicated at the time that these exhibits were excluded, that they were excluded, among other reasons, because they were argumentative and were the type of matter which could better be presented to the jury on argument.

I don't know clearly whether there will be proposed such a use of them, but as to the summary of earnings I am [3790] wondering, procedurally, whether your Honor will have objection to furnishing to the jury, in connection with argument, summaries of that nature which are summaries of testimony, where they have not as yet been introduced in evidence. If that procedure is not possible, we would reoffer these exhibits as summaries of the testimony, as summaries of the statistical material, which, although it appears in the record, appears in a somewhat disjointed form, so that they may be available for purposes of assisting in presenting the picture to the jury.

Whether they are in evidence or whether they are merely used in aid of argument is more or less immaterial to us.

The Court: I am not going to permit any further exhibits or written summaries to be passed to the jury after the evidence is closed. I will, however,

as is customary, permit either counsel to scribble on a blackboard, in those instances where you argue to the jury. You can use the blackboard. It is not an exhibit and it doesn't have to be preserved. It is merely your effort to point up some point that you are making, to be pointed out to the jury. I will not, however, permit any new documents to be received.

However, incorporating the objections heretofore made, the objection is again sustained to BH and BJ. And for the additional reason that they are cumulative in view of all the evidence now in the record. [3791]

Mr. Stark: In the case of BI, which was the summary of the withdrawals by Nicholas J. Winckler, as to which testimony was introduced in evidence covering all of the figures other than the forgiveness of indebtedness, we wish to again offer that exhibit, and particularly the figure of $38,000 forgiveness, calling to the court's attention the fact that this was not only a so-called forgiveness of past indebtedness, but involved forgiveness of sums which had not yet been paid, the last of the payments for the Smith stock being made not until October of '49, the forgiveness being in [3792] June.

We reoffer Exhibit BI, to show the total diversions from the corporation of funds, or the total payments made by the corporation to Mr. Winckler.

The Court: The objections that were heretofore made when it was excluded, which are incorporated

by reference, are sustained; and on the further ground that the matter is cumulative.

Anything further?

Mr. Stark: We have one last group.

The Court: Are these ones that have been ruled on before?

Mr. Stark: What I am referring to is the broker letters. Some broker letters have been admitted, some broker letters have been rejected. And as to those which were admitted, a substantial number of them, substantially all of them, I believe, were admitted for the limited purpose of impeachment. We should like to reoffer at this time—I have the letter designations, but I think they have been referred to enough in the record as the broker letters.

The Court: Is it satisfactory to call them broker letters?

Mr. Dixon: That is satisfactory, your Honor.

Mr. Stark: The broker letters, both those admitted in evidence, and those rejected, offered and rejected, are reoffered for all purposes, including proof of the contents [3793] of the statements contained therein.

The Court: The truth of the facts, alleged facts contained therein?

Mr. Stark: Yes. On the ground that the brokers reporting and being corresponded with are agents of Winckler & Smith Corporation. That these were communications in the normal course of business, and that they constitute admissions of the plaintiff.

On that further ground we reoffer the broker letters for all purposes.

The Court: The objections heretofore made will be incorporated. The objection is sustained. And on the further ground that you skip over this agency thing with a very light and nimble touch.

I would imagine that the broker would not be an agent of the company, any more than a broker who sells insurance is an agent of the [3794] company.

* * *

The Court: Incidentally, I don't know how consistent I was on the broker letters, but I think you knew the pattern that I was trying to follow. If I have overlooked some that fit in a category, one or the other, I will be glad to look at them again.

I was trying to follow this theory, that they were proper [3808] as impeachment of Winckler where they related to matters other than navel orange juice, because Winckler had admitted that he had had complaints about navel orange juice. That they were not admissible for the proof of the matters contained therein.

That was the pattern that I was trying to follow. Whether I did it successfully or not, I am not now prepared to say.

Mr. Stark: I thought that was pretty thoroughly threshed out, and I didn't mean this offer either to change our position as previously stated or to reopen the full discussion, but merely to state the broader ground of offer, which was not perhaps fully stated at that time, although it was indicated in the record.

The Court: I understand.

I take it that generally you are content, let's say with minor deviations or errors, that I tried to be consistent on that pattern of broker letters?

Mr. Stark: To the extent that one who is on the short end of a ruling concedes consistency, I suppose so, your Honor.

It certainly was clear what your Honor was expressing. [3809]

* * *

Mr. Fisher: As the defendants' next exhibit in order, I desire to offer a copy of the amended Articles of Incorporation of Sunkist Growers, Inc., and of the Bylaws, as existing in 1951. They are contained in a booklet which we are offering in evidence, and there was attached in the booklet a copy of the 1940 Exchange District Exchange Association agreement, which is already in evidence, so rather than tearing the book apart I have simply marked that out, and a copy has been shown to the plaintiff.

The Court: The Bylaws and the amended Articles are all in the same booklet?

Mr. Fisher: That is correct.

The Court: What is the next exhibit in order?

The Clerk: Defendants' Exhibit FH.

The Court: FH received in evidence.

(The exhibit referred to was marked Defendants' Exhibit FH, and received in [3811] evidence.)

Mr. Fisher: We next offer a copy of the Arti-

cles of Incorporation of Exchange Orange Products Company as in effect in 1951.

The Court: That will be FI.

FI received in evidence.

(The exhibit referred to was marked Defendants' Exhibit FI, and received in evidence.)

Mr. Dixon: I hope the jury finds this stimulating reading, Ross.

Mr. Fisher: Finally, as the next defendants' exhibit in order, I offer a copy of the Bylaws of Exchange Orange Products Company, as in effect in 1951.

The Court: FJ in evidence.

(The exhibit referred to was marked Defendants' Exhibit FJ, and received in evidence.)

Mr. Fisher: May it be stipulated, Mr. Dixon, that they are true and correct copies?

Mr. Dixon: Yes.

The Court: Does that complete it?

Mr. Fisher: That is all I have.

The Court: And defendants rest?

Mr. Strachan: Yes, your Honor. [3812]

* * *

(The following proceedings were had in the hearing and presence of the jury.) [3816]

* * *

The Court: That was at a time when they were still in Chapter XI.

* * *

I call to your attention, and this is a comment of mine which you may disregard, but in considering some of the issues in this case, Exhibits K, AY and 84 should be considered together. L is rather immaterial. It is one of these waiver of notices of a meeting and doesn't add much one way or the other. So those are in evidence.

BU is in evidence, which is an exhibit concerning Florida price trends. [3817]

EX is in evidence. That exhibit I have agreed to say something to you about. The parties stipulated that had one of the accountants for Sunkist been called to the stand, he would have testified he prepared two large sheets that are part of Exhibit EX as a—I guess we might say they are what he would call a breakdown analysis, something like a cost analysis, but an expenditure analysis of the moneys spent by Sunkist for product advertising in 1951, and that as to certain of the matters, if he were examined on cross-examination by the plaintiff, he would say that as to certain of the matters they fell into place very easily because of the nature of the items, and as to others he used his judgment as an accountant in making the allocation to the particular product, that the allocation made to Sunkist had a number of products they were selling, and this was some attempt to allocate the advertising to the various products.

The defendants would call attention to the fact that according to these computations, 15/100ths of one per cent was allocated particularly to the advertising of single-strength orange juice.

Have I said what I said I would?

Mr. Stark: Would your Honor add that the witness would also testify that the record, the allocation record, was one prepared in the normal course of business apart from this lawsuit? [3818]

The Court: That's right. The records of the company from which the accountant made these larger sheets were records kept in the regular course of business of the Sunkist company prior to the happening of this lawsuit.

Is that what we agreed I would say?

Mr. Stark: Yes.

* * *

Mr. Stark: It is stipulated as a fact that the selling price, that is the gross selling price on Sunkist frozen concentrated orange juice during the period from July 9 to October 22, 1951, was $2.11 per dozen, and when I state gross selling price, that is the price which would be billed and would be subject to any trade discounts or allowances [3819] which might exist, and as to which there is no knowledge or stipulation.

Is that correct, Mr. Dixon?

Mr. Dixon: Yes. I am sure that is agreeable, Mr. Stark.

The Court: Now, the good news I have for you is that the defendants have rested and the plaintiffs expect to rest today.

* * *

NICHOLAS J. WINCKLER

called as a witness in rebuttal by the plaintiffs, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Dixon:

* * *

Q. Directing your attention to Defendants' Exhibit FG, which purports to cover the amount of Valencia oranges obtained by Winckler & Smith during the year 1951, I notice that you [3820] start to show, or the record apparently starts to show the obtaining of Valencias in February of 1951. Testimony heretofore given in this case is, generally speaking at least, that the Valencia season opens around about June or July, the middle of June.

Will you state to the jury by way of explanation of this exhibit what those items running through and up to the early part of June were, insofar as the Valencia oranges are concerned?

A. In February and March, there are no Southern California Valencias available. Further more, in February there are even no Central California Valencias available. So the fruit indicated here in February and March was either navel or must have been, if it is earmarked Valencias, Arizona fruit, either Valencias or sweets, or some miscellaneous variety of oranges.

Q. Will you state to the jury, Mr. Winckler, what those oranges were processed into or what

(Testimony of Nicholas J. Winckler.)

products they were processed into, if you can now recall?

A. These early Valencias or winter oranges were processed in some blended juice.

Q. I direct your attention to the price column there. I notice that there is some variance in the price. Will you state to the jury, if you know, the basis pursuant to which the price of the tonnage set forth in Exhibit FG was determined? [3821]

A. I don't understand the question. You mean if it was an agreed price between buyer and seller, or if it was based on soluble solids or not?

Q. Yes. What was it based on, Mr. Winckler, if you recall?

A. The early fruit in April, and so on, where the prices, for instance, I read the price on the top right-hand side column, $34.23, and that undoubtedly indicates that it was determined based on the soluble solids.

But whenever we started to go into Valencias in June, where the price is a round figure, like $35, and so on, that was just determined by the ton and not on soluble solids.

The Court: When you say the round figures, you mean the figure without some cents?

The Witness: Without some cents, $35 even.

The Court: Yes, I understand. Because, if you were figuring it out on a solids basis, it would probably come out with a few cents, to be exact.

The Witness: A fraction. We have a figure here of $32.28, which clearly indicates soluble solids.

(Testimony of Nicholas J. Winckler.)

The Court: All right.

Q. (By Mr. Dixon): Now, Mr. Winckler, you may have heard some reference in this case from Mr. Finley concerning the term grower participation contract. Have you ever heard that term used in the industry, the processing industry in [3822] this area, while you have been in business?

A. Never before.

Q. Now, when was the first time, Mr. Winckler, that you had any actual knowledge of the contents of the contracts between TreeSweet and Exchange Orange? By contracts I am referring to the contracts that are now in evidence in this case as Plaintiffs' Exhibits and covering the supplying of Valencia oranges to TreeSweet by Exchange Orange, particularly during the years 1948, 1949, 1950 and 1951?

A. Not till defendants furnished photostatic copies of these contracts and they were shown to me by counsel.

The Court: You mean after the suit was filed?

The Witness: After the suit was filed.

Q. (By Mr. Dixon): You had no knowledge of the existence of those arrangements as set forth in those contracts at the time you had your discussions with Mr. Finley or with Mr. Kelly concerning the acquiring of oranges in 1951?

A. I would answer it that way. I had no knowledge whatsoever of the contracts for 1947, 1948, 1949 and 1950. I had some second-hand knowledge

(Testimony of Nicholas J. Winckler.)

that some kind of a contract must have been made between——

Mr. Strachan: I object to his testifying as to his second-hand knowledge and what he thought was meant.

The Court: Overruled. You may cross-examine. Go ahead.

The Witness: That some kind of a contract must have [3823] been entered into between Silzle and the defendants and TreeSweet and Sunkist. Otherwise, they couldn't have offered orange juice for $2.20.

Mr. Strachan: I move to strike that.

The Witness: But I had no knowledge.

Mr. Strachan: I move to strike that as argument and conclusion.

The Court: That last statement, after the word "otherwise," may go out. The jury is instructed to disregard it. You have answered the question. Ask another one, Mr. Dixon. [3824]

* * *

The Court: Why don't we give this a new one, if you agree, 69-A, and give it to the jury instead of 69, but leave 69 marked for identification here.

Mr. Strachan: And the record should show, I believe, that we have all of the objections to 69-A which we had to 69, except to the extent that objectionable language has been removed from 69-A.

The Court: Oh, yes.

Mr. Strachan: There is no reference here to Winckler & Smith's damages.

The Court: That's right. 69 would then be pulled out of evidence but kept as an exhibit.

Mr. Strachan: That's right. It is a part of the record of the case.

The Court: I see now the line has been changed. It said Winckler & Smith damages, and that has been obviated. Let's do it that way. Is that satisfactory?

Mr. Strachan: Suits me.

The Court: Mark it 69-A in evidence, reserving to the defendants all objections they had to 69.

(The exhibit referred to was marked Plaintiffs' Exhibit 69-A and received in evidence.)

The Court: Then take 69 out of evidence but keep it [3828] as an exhibit for identification.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [3829]

Thursday, February 2, 1956—2:00 P.M.

The Court: The record will show the jury present.

Mr. Irwin: With regard to Exhibit 66, your Honor, Mr. Fisher has examined the revised, new 66-A, which has been mimeographed to put in proper form the changes and amendments that are noted on 66, and I believe it is agreed that that may be marked Exhibit 66-A.

The Court: Did you hear Mr. Irwin's statement?

Mr. Fisher: No, I didn't.

The Court: He said you examined the revised 66, which is now marked 66-A.

Mr. Fisher: Yes.

The Court: And that it is offered in evidence as 66-A, with all the objections you heretofore had to 66, and 66 will be withdrawn from evidence and will remain for identification.

Mr. Fisher: Yes.

The Court: 66-A will be received in evidence, subject to all the objections heretofore made, which are overruled, and 66 is now withdrawn and will remain for identification.

(The exhibit referred to, marked Plaintiff's Exhibit 66-A, was received in evidence.)

The Court: Did we do the same thing as to 69?

The Clerk: Yes, except it was done out of the presence [3830] of the jury.

The Court: The same procedure has been followed with 69. There were some ink corrections on 69 at the time it was used, there was certain language in the language part of the exhibit which had been changed, and 69-A, the revision, has been marked and received in evidence in your absence, and 69 is withdrawn from evidence, but will remain as an exhibit in the case for identification only, and all objections heretofore had by the defendants to 69 are incorporated as the objections to 69-A, if there were any—I don't remember—as to the document itself, and they are overruled. [3831]

* * *

ROBERT HODGE

a witness called by the plaintiffs in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Dixon:

Q. Now, Mr. Hodge, you have been sworn before in this case, is that correct?

A. That is correct, sir.

Q. Directing your attention to Plaintiffs' Exhibit 61 and the profit computed therein as resulting from the operations of the plaintiff during the fiscal year ending January 31, 1949——

The Court: Exhibit 61?

The Witness: It is 1950.

The Court: 1950.

Mr. Dixon: I meant January 31, 1949.

The Court: Then you have got the wrong [3833] exhibit.

Juror Berger: A question. Before we get started on these, are we interested in the footnotes on Exhibits 63 and 65, which are supposed to accompany these reports?

The Court: They are in evidence, and we have numbered them. They were accompanying letters by the auditor, and we have numbered them with a letter, so that the one as to 65, I think, is called 65-A.

Juror Berger: Do they have any bearing on these?

The Court: They are for your consideration, but

(Testimony of Robert Hodge.)

I don't think they have any bearing during this particular redirect examination.

The Clerk: You don't have copies of those; you just have one copy.

The Court: Do you want 50 instead of 61?

Mr. Dixon: No. It is January 31, 1950, is the correct statement. Fiscal year ending January 31, 1950.

Q. (By Mr. Dixon, continuing): And Defendants' BD, which shows a loss for the year. I believe the difference in the profit figure shown on 61 in the amount of $121,360.21 and the computed loss by the defendant of $91,220.20 is a difference of $212,520.41. Will you explain to the jury, Mr. Hodge, by referring to these two exhibits, why you are of the opinion that the loss as computed by the defendants in their Exhibit BD is incorrect as compared with your computations as set forth in Plaintiffs' 61? [3834]

A. In Exhibit BD, the loss on the sale of the plant of $170,579.56 has been included in income as if it were a normal loss of the company from operations. In my concept of the income account, I do not consider——

Q. Now, will you first state where you find that amount?

A. It is on Exhibit BD, under "Miscellaneous Expense" (depreciation on appreciation and loss on sale of assets) in the January 31, 1950, column.

Q. In the total amount of how many dollars?

(Testimony of Robert Hodge.)

A. $170,579.56.

Q. Thank you. Proceed.

A. In my opinion, that is not a normal operating loss. It was part of the reorganization proceedings and is in the court order dated—pardon me.

Mr. Strachan: Just a minute. I think he has to put the court order in if there is something in the court order that is relevant, and not put in his construction.

The Witness: It is Exhibit 84-A, your Honor.

The Court: Have you agreed upon the form of 84?

Mr. Fisher: We haven't yet, your Honor.

The Court: Then I am going to receive in evidence 84, subject to any amplification or additions to it as may be suggested later on.

Mr. Fisher: I may say, we would prefer to have the court [3835] order itself in, because only excerpts were submitted to us.

The Court: I am giving you the opportunity to have presented for consideration what you want in, but 84 is received in evidence, subject to that limitation.

(The document referred to, marked Plaintiffs' Exhibit No. 84, was received in evidence.)

Mr. Strachan: Then my objection becomes the one that the court order or Exhibit 84 will have to speak for itself, and it is not the function of this witness, however expert he may claim to be, to construe the court order and give his version and effect of it.

(Testimony of Robert Hodge.)

The Court: As an expert he may base his opinion upon various matters. That is a matter of cross-examination. Where did the answer leave off?

(The answer referred to was read by the reporter as follows: "In my opinion, that is not a normal operating loss. It was part of the reorganization proceedings and is in the court order dated"——) [3836]

The Witness: ——February 14, 1949.

The Court: Keep your voice up.

The Witness: Yes, sir. Which in part states:

"Ordered that as a condition for this order that this order of confirmation may be vacated and set aside without notice to the debtor or any other creditor or other party in interest if by March 11, 1949, the $40,000 now on deposit with the Title Insurance & Trust Company Escrow No. B11296 is not delivered and paid to the Receiver for the purpose of this confirmation pursuant to the terms of said escrow and debtor fails to pay and reimburse the Receiver for the monthly maintenance expenses from December 14, 1948, to the close of Escrow No. 368-8659, where money for that purpose is now on deposit."

Now, these two escrows mentioned in this order, one is the escrow with the Title Insurance Company, which covers the sale of the plant, and the other the escrow with the Bank of America, No. 368-8549, which turned over the balance of the pro-

(Testimony of Robert Hodge.)

ceeds to the company to be used for certain purposes.

Now, they are specifically mentioned in this order, so I naturally assume that they are part of the reorganization proceedings. Therefore, the loss occasioned by these escrows, or this sale, rather, is not part of the normal operations of the [3837] company.

The other large item of difference is the $38,000 forgiveness of debt of Mr. Winckler which we have discussed here a great deal and I am sure you are all familiar with it. I have considered it as part of the reorganization proceedings and not part of the normal operations of the company.

The other small difference is a matter of opinion between Mr. Lynch and myself as to the amount of depreciation that should be provided in the company's operations during that period.

Q. And those three items which you have mentioned amount in substance to the difference of $212,000 plus between your statement covering the operations of Winckler & Smith for the fiscal year —covering the income from operations of Winckler & Smith for the fiscal year ended January 31, 1950, is that correct, Mr. Hodge?

A. That is correct.

Q. In your opinion the manner in which you handled these items that constitute the difference at the time you set up the books for the plaintiff, Winckler & Smith, and made up the operating expense, I mean the statement of income, Plaintiffs'

(Testimony of Robert Hodge.)

61, was in accordance with sound accounting procedure, is that correct? A. They were.

Q. Now, directing your attention to Plaintiffs' 63 and the income account therein, which shows a profit to the [3838] plaintiff for that year ending January 31, 1951, your statement shows an operating profit of $40,845.53, whereas the defendant under its computations in BD shows a loss of $14,203.20, or a difference of $55,048.73.

Will you explain to the jury what items you disagree with in your opinion in those two statements from an accounting point of view as they are carried by you and set up by you during that year in Plaintiffs' Exhibit 63 and as they are computed in Defendants' Exhibit DD?

A. At the time I made the examination for the year ended January 31, 1951, it was determined that the company had quite a promotion program to promote the sale of new products. They had spent some $50,000 on that promotional program. We determined that the program was good for two years and so deferred half of it to the following year. That accounts for some approximately $25,000 of the difference.

The other large item is the unabsorbed preseasonal expense item of $22,443.84, which at that time we determined that the company had spent in advance for the succeeding season and so was a proper charge to the succeeding season's expenses and not this one's.

There is a small item of $3,550 which we carried

(Testimony of Robert Hodge.)

as an advance to an employee, which we determined at that time was due from the employee. Mr. Lynch in his statement has [3839] charged it off to expenses.

This amount represented a prepaid bonus. Mr. Lynch charges it off to expense. Even under his own accounting, it wouldn't have been earned, so how it could have been charged off to expense that year, I don't know.

Q. In your opinion, Mr. Hodge, and as you set up the income statement for the fiscal year ending January 31, 1951, at that time was the income account as prepared by you in Plaintiffs' Exhibit 63 at that time in your opinion in accordance with good accounting practice? A. It was.

Q. Directing your attention, Mr. Hodge, to Plaintiffs' 65, in which your statement of income for the fiscal year ended January 31, 1952, shows a loss of $184,523.20 in operations as against a loss computed by the defendants for that year in BD of $157,426.15, or a difference of $27,097.05, will you state to the jury what that difference represents?

A. The items that I mentioned that Mr. Lynch had written off in the year ended January 31, 1951, he has taken those items out of my loss for the year ended January 31, 1952, and thrown them into the year ended January 31, 1951. That results in a reduction of my loss of approximately $55,000.

Offsetting that credit, he has set up an item here under miscellaneous expenses, depreciation on ap-

(Testimony of Robert Hodge.)

preciation, a loss [3840] on sale of assets, of $21,536.74.

There already is reflected in the books a write-off of $21,416.51 on appreciation, so I believe that Mr. Lynch is in error in that he has duplicated the write-off that is already reflected in the books. In other words, he has made the same write-off twice, in my opinion.

Q. Now, Mr. Hodge, based upon the income statement as prepared by you for the plaintiff for the fiscal year ended January 31, 1952, at the time you prepared it and now do you regard the statement as prepared by you at that time and as set forth in Plaintiffs' Exhibit 65 as having been prepared in accordance with sound and good accounting practices? A. I do, sir.

Q. Directing your attention to Plaintiffs' 69, I believe the computations contained therein as prepared by you indicate that had an additional 12,000 tons of Valencia oranges been available to the plaintiff on the basis comparable to that at which they were made available to TreeSweet, that instead of sustaining the loss reported in 65, that is in Plaintiffs' 65, of $184,523.20, for the fiscal year ending January 31, 1952, that the plaintiff, Winckler & Smith, would have shown an operating profit of $25,231.45, as against an operating loss as computed by defendants in their CB of $212,829.03, or a difference between your computation in Plaintiffs' 69 and Defendants' computation in CB of $238,060.48, is that correct? [3841]

(Testimony of Robert Hodge.)

Mr. Strachan: May it please the court, I would like to have available, by reference, the objections which I made to similar testimony with respect to Exhibit 69, particularly on the ground that there is no comparability being shown, and the question of comparability is left to the witness.

The Court: That may be available.

Overruled.

Mr. Dixon: I think the record should show 69-A. Attention has just been directed to the fact that I apparently was referring to the old 69. 69-A, Mr. Hodge.

Is your answer still the same by referring to 69-A with reference to the difference?

The Witness: I am afraid you lost me. I don't want you to repeat it all——

Q. (By Mr. Dixon): Well, assuming the figures to be the same in 69-A, as in 69, to which I referred erroneously in my question, would your answer be the same? A. Yes, sir.

Q. Now, will you tell the jury wherein you disagree in your opinion with the computations prepared by the defendant and as shown on their CB, as against the computations prepared by you and as shown on Plaintiff's 69-A?

A. In defendants' computation of estimated Winckler & Smith processing cost they arrive at a per ton cost of [3842] $44.99. Now, included in this figure is $2.44 for ingredients.

As I understand it, it is not necessary to add ingredients to process unsweetened orange juice,

(Testimony of Robert Hodge.)

so, therefore, that cost is not necessary. Multiplying that out it is roughly some twenty-nine, thirty thousand dollars.

In the defendants' computation also is included an amount of $15.40 for plant expense. This is additional plant expense, now. If that were so, added to the plant expense that the company had for that year of $177,825.94, that would make a total plant expense of $362,625.94 to process some 20,000 tons of oranges.

In the year ended January 31, 1950, the company processed some 18,300-odd tons of fruit, and the plant expenses were only $203,906.26. Roughly a difference of about $159,000 to process some 2,000 more tons of fruit. Plus any additional costs—increase in costs that may have occurred during the two years.

Well, that to me is just absolutely impossible, that a company could spend that much more to produce roughly ten per cent more fruit. So I would estimate that Mr. Regan's plant expense is overstated by $110,000, $120,000.

I think the fallacy in his reasoning is that he does not take into consideration that the company had all of the more or less fixed maintenance costs already in their costs. They would not incur them again. The depreciation of the [3843] plant wouldn't be necessary again, and all such fixed costs like that. He has just got them in there twice, in my opinion.

Q. All right. Will you proceed further to point

(Testimony of Robert Hodge.)

out what further differences there are between your computations in 69-A and Defendants' CB?

A. Defendants' computation for selling expenses, he estimates that there should be $60,000 additional selling expenses to sell this 12,000 tons, had they been available.

If you add that to the actual expenses of $87,652.44, that would mean that the total selling expenses under his computation would be $147,882.06.

Now, this compares with the actual selling expenses in the year ended January 31, 1950, of $86,855.15, or a difference of some $61,000 additional.

Well, as I felt about the plant expenses, it just can't be, that is all. You just wouldn't spend that much money.

The only increased expenses, offhand, would be, in my estimation, a brokerage of roughly $22,500, plus a few incidentals here and there down the line.

The staff was there, the salesmen were there, they didn't need to hire anyone else.

It has already been brought out in testimony that the market was short that year. There would be no tremendous effort needed to sell the fruit. It was in great demand. [3844] Why would they have to spend all this money to sell it?

Mr. Strachan: I object to that. It is an argument under oath. There is no showing that it was in short supply. There is a showing it was a glut on the market. It would take an extraordinary amount of money to sell this additional juice.

(Testimony of Robert Hodge.)

The Court: Overruled. He is giving his opinion and his reasons.

Q. (By Mr. Dixon): Will you state to the jury what you are basing your opinion on as to the salability of the products of single-strength orange juice? A. Specifically?

Q. Yes. A. Mr. Finley's testimony.

The Court: You were here and heard it?

The Witness: No, but I read it.

The Court: You read it in the transcript?

The Witness: Yes.

Mr. Strachan: I move to strike the answer. It is not the function of even a claimed expert witness to interpret the testimony of another witness. The jury can do that.

The Court: Overruled.

Mr. Dixon: Counsel, your own exhibit——

The Court: Overruled.

Identify, though, which testimony. The last time he [3845] came in, or the previous time he testified?

The Witness: I am sorry, I didn't take notes of it.

The Court: When did you read it?

The Witness: Last night.

Mr. Strachan: Which testimony did you show him, Mr. Dixon?

Mr. Dixon: I don't recall, counsel.

The Witness: There were a tremendous number of pages. I am sorry.

The Court: Go ahead.

(Testimony of Robert Hodge.)

Q. (By Mr. Dixon): In any event, it was on that basis, was it, that it would not require any substantial additional sales force to sell the products, other than those that were already on the sales staff of Winckler & Smith in 1951—was it based upon that? A. It was based on my opinion.

Q. But on that assumption?

A. That is right, sir.

Q. That the additional sales expense set up by Mr. Lynch in his 69—in the amount of approximately how many dollars? A. $60,000.

Q. ——$60,000 would not be required?

A. Well, you would require the brokerage, and a few incidentals. But certainly $25,000, I think, would [3846] have covered all of them. So there is $35,000, in my opinion now, excess there.

Q. Are there any other items of substance, Mr. Hodge, that you wish to refer to in Defendants' CB, that you wish to call attention to when compared with your 69-A?

A. Yes, sir. There is an increase in administrative expenses of $40,000. Now, adding that to the actual amount of expenses for general administrative expenses for the year ended January 31, 1952. would make a total of $133,613.49 for such expenses, according to the defendants' computation. Now, this compares with the actual expense in the year ended January 31, 1950, of $56,417.38 for comparable tonnage, and I believe it is very high, and in my opinion there would not have been any additional ad-

(Testimony of Robert Hodge.)

ministration expense necessary, except a few minor incidentals.

Naturally, you are going to use paper and telephone and a few things like that, but certainly not in any amount like $40,000. The staff was all there, there was no need to hire additional employees, or anything else.

Q. Are there any other items, Mr. Hodge, that you wish to refer to, or does that account, in substance, for the difference?

A. Mr. Regan in his Exhibit CB took in the gross loss on actual operations per Exhibit 65 of $10,000-odd that I didn't include. If we are going to go that far, I think we [3847] ought to give the company credit for the miscellaneous income shown on Exhibit 65 of some practically $7,000.

Q. Does that conclude it?

A. Those are the large items, substantial items.

Q. Having compared 69-A, your computation, with the one prepared by Mr. Regan, Defendants' CB, are you still of the opinion previously expressed, Mr. Hodge, that had the plaintiff had an additional 12,000 tons of Valencia oranges available to it for processing single-strength Valencia juice in 1951, that instead of sustaining a loss in excess of $184,000 from its operations in that year, that it would have recouped that loss, and in addition thereto would have shown an operating profit of approximately $25,000 for that year?

A. I am.

Mr. Dixon: Your witness, counsel.

(Testimony of Robert Hodge.)

Mr. Strachan: No, he is not.

The Court: The jury will disregard this. It is a very clever remark.

Mr. Strachan: It is a heartfelt remark.

The Court: Lawyers have a habit of saying at the end of their examination, "That concludes my examination," or "You may cross-examine," or "Your witness." In other words, he is tendering the other side the witness. Mr. Dixon used the formal phrase, "Your witness, Mr. Strachan," and Mr. [3848] Strachan said, "No, he is not my witness."

Mr. Strachan: Excuse me, please.

The Court: It is one of the things that makes life interesting in a courtroom.

Go ahead, sir.

Mr. Dixon: I missed the remark.

Cross-Examination

By Mr. Strachan:

Q. Mr. Hodge, in the selling expense as you set it up for the year ended January 31, 1952, you included, did you not, the carryover or deferred expense from the prior year in approximately the amount of $25,000?

A. That is correct, sir.

Q. None of that expense that was carried over into that year was carried over for the purpose of processing this mythical 12,000 tons of Valencias, was it?

(Testimony of Robert Hodge.)

A. That would be true of any of the selling expense in the statement, sir.

Q. What?

A. None of the selling expenses in Exhibit 65 were for the processing of this mythical 12,000 tons.

Q. You didn't at the time you made up that 1951 statement treat that 25,000 of deferred expense, carried over into the following year, as being deferred for the purpose [3849] of enabling the sale of the juice produced from the 12,000 mythical tons, did you?

A. I never even knew about the 12,000 mythical tons. [3850]

Q. So what was the total amount of the expense as it actually was incurred in the year ended January 31, 1952, excluding this expense of the prior year that you carried over?

A. It would be about 24,000 less. It would be 63,000 odd.

Q. What? A. 63,000 odd.

Q. You also have included in the expense as it was incurred in the year 1952, expenses incurred in connection with Florida sales, have you not?

A. Yes, they are in there. Yes. 87,000.

Q. What?

A. They are all in there, yes, sir.

Q. The expenses that were incurred in disposing of product of the Florida venture didn't contribute at all to the sale of the mythical 12,000 tons?

A. No, sir.

(Testimony of Robert Hodge.)

Q. You haven't adjusted your figures to take into account even those two items, have you?

A. No, sir. They are actually as shown by the two exhibits.

Q. Now, we go back to 69-A. You and I had quite an exhaustive, perhaps exhausting, session on the original 69. Basically, the method that was used in preparing 69-A was that [3851] used in preparing 69, is that correct?

A. The figures are exactly the same, sir, yes, sir.

Q. So that if I asked you with respect to the figures and the way in which you arrived at the figures in 69-A, you would give me the same answers that you gave me at the time I examined you with reference to 69, is that correct?

A. I would try to.

Q. Presumably that is where we would come out? A. That's right, sir.

Q. Now, referring to BD, starting backwards on that, we discussed in connection with your income accounts for 1952 and 1951 the question of where these undistributed factory expenses should fall as between the two years, didn't we?

A. You mean for the years ending January 31, 1951, and 1952?

Q. Yes. A. Yes, sir.

Q. So we have been all over that in connection with the others?

A. Yes. There was nothing new here today.

Q. Then getting back, your answers to questions

(Testimony of Robert Hodge.)

then would apply to the balance sheets today to the same effect as they did then?

A. Yes, sir. [3852]

Q. Now, we get back to January 31, 1950, and we have been over the forgiveness of indebtedness about as completely as we could?

A. I hope so.

Q. Yes. So you wouldn't want to change any of your testimony with regard to that, would you?

A. No, sir.

Q. Then we get down to this question of loss of fixed assets. You recall, do you not, that I showed you a report over your signature which stated that the loss of 169,000 resulted from sale as of March 1, 1949? Do you remember having said that?

A. Yes, sir.

Q. Are you familiar with the journal entry prepared by you which is Defendants' Exhibit BK, relating to that item?

Mr. Strachan: Have you BK and Plaintiffs' Exhibit 59, Mr. Clerk, please?

The Witness: I have a copy of it. July 31, 1949?

Q. (By Mr. Strachan): That's right.

A. Yes, sir.

Q. In that journal entry there is a reference made to Winckler-Smith plant sold to stockholders April 3, 1949; is that correct? A. Yes, sir.

Q. Do you recall this income, Federal income tax return [3853] for the year 1949 which bears the stamp of Hodge & Company?

A. July 31, 1949?

(Testimony of Robert Hodge.)

Q. Wait a minute. A. I am sorry.

Q. January 31, 1950? A. Right, sir.

Q. You recall, do you not, that in parallel columns in which you reported the loss, showing cost value in one and appraisal value in the other, coming down to the total loss of $169,000, that schedule entitled Sale of Property Other Than Capital Assets, April 3, 1949? A. Yes, sir.

Q. Do you recall that?

A. I recall it very well.

Mr. Strachan: That's all on cross. Thank you.

Mr. Dixon: Your Honor, no redirect.

The Court: All right. Mr. Hodge, you are excused. Thank you.

The Witness: Thank you.

The Court: Get away fast.

(Witness excused.)

Mr. Dixon: The plaintiff rests, your Honor.

Mr. Strachan: The defense has nothing further. We would like to enter a motion at the close of all the evidence.

The Court: All right. This matter of this court order [3854] in the reorganization proceedings, you will get at that promptly?

Mr. Fisher: I have been able to examine the file and I suggest that Exhibit 84, being a copy of the petition for leave to present third modified arrangement, filed February 14, 1949, in the Chapter XI proceedings, and the order confirming the third modified arrangement in the Chapter XI proceed-

ings, filed the same day, that those two be Exhibit 84.

The Exhibit 84 as proposed is simply excerpts from the petition and the order.

The Court: Let me see the file.

Mr. Fisher: In order to have a complete picture, the petition and order itself should be in it.

The Court: Let me see that file. Well, we could take this up without the jury and work out something that is satisfactory. [3855]

* * *

(The following proceedings were had outside the hearing and presence of the jury.)

The Court: Let the record show the jury absent. The jury have been remarkably patient. They are citizens who leave their homes and business for the length of this case.

I notice in this file which was handed up to me a deposit [3856] slip to the account of Lynch, Receiver, dated March 1, 1949, of $40,000 in one check and $1,909.59 in a second check. Does that demonstrate the day on which Lynch got the money, the $40,000 and, secondly, does the $1,909 represent the reimbursement of that expense he was to get under the order?

Mr. Dixon: Is the question directed to the plaintiff, your Honor?

The Court: To anybody who knows. I see Mr. Hodge nodding. Have you looked this file over?

Witness Hodge: I looked over the escrow statement, sir, and that is what it stated.

The Court: This $1,909.59, was that the reimbursement talked about in the order?

Witness Hodge: Reimbursement of Lynch's expenses from December, 1948, to that date.

The Court: And the $40,000 was when Lynch got the money out of escrow?

Witness Hodge: That's right, sir.

Mr. Dixon: If it please the court, if I may rise to explain my views on this matter now that we finally have got this record here of the transaction into the record in this case, it seems to me almost as a matter of law the court, if there is any question about it, the court would be required to instruct the jury that the sale of this plant to the extent that it was in any way an issue in this case or on the books [3857] of account was effective during and was a part of the reorganization proceedings pursuant to which the sale would have had to have been completed and perfected before the trustee would have been discharged and the Chapter XI proceedings terminated.

The Court: I am in agreement with you. I was going to raise the same point, that I should probably as a matter of law interpret this order, and I don't think it is a debatable proposition. I will hear the defendants on it, but I will be much dissappointed, unless the defendants can convince me that there is any question of fact involved here, if it is the defendants' contention that the sale of the real property and the plant was something other and apart from the reorganization proceedings. As a matter of law, you might have a point, but otherwise, read-

ing the matter over, it is the first time I have looked at it, it is clear to me this was an affirmation of the plan of reorganization on condition, a condition subsequent, which never happened, and the order was set up on such a basis that the escrows were already opened, and when this money came in it was to go to Lynch and Lynch was then to pay the bills set forth in the order, and so forth.

The fact that this happened on March 1, and when he got the money or that things happened at later dates thereafter, or that this reorganization proceeding was finally terminated and the receiver discharged in November, doesn't have anything [3858] to do with it.

I don't think it can be argued as a matter of law or as a matter of accounting that the sale of the assets of this business were a part of reorganization proceedings. The reorganization proceedings could never have been affirmed, this company would still have been in reorganization or in bankruptcy under that first proceeding, had that sale not been made. It was that proposed sale in escrow which made available the money to get the company out of reorganization.

As a matter of law and logic and what I know about accounting, I think a false issue was injected by the talk about the loss on the sale of the business being part of a fiscal year of the plaintiffs which started after they went out of reorganization.

Mr. Strachan: Just briefly stated, your Honor, I believe our position on that is that this was a voluntary sale by the corporation to its stockholders on

terms agreed upon between the officers and the stockholders, and that the only interest of the creditors and the receiver in the proceeding was to obtain the proceeds of that sale; that as a matter of law and as a matter of fact both, the transactions occurred and were in fact transactions having to do with the capital assets of the fiscal year ending January 31, 1950. They were so recorded by Mr. Hodge in his journal entry. They were so reported by him in his audit report, and they were so [3859] reported in the income tax return, as having occurred in that year and should, therefore, have been reflected, and should in this proceeding be reflected precisely as they were in the books and records of account and the income tax return.

The Court: The income tax return, I don't know how that got in evidence.

Mr. Strachan: The plaintiff put it in.

Mr. Dixon: For a very limited purpose, your Honor. As I explained before, counsel had suggested——

The Court: Did you offer it?

Mr. Dixon: Yes; for the very limited purpose, your Honor, of showing the two methods of determining valuation and to support the appraisal only.

The Court: The income tax accounting problems are not decisive of how a company might maintain a set of books.

But, anyhow, let me ask you this, Mr. Strachan. Do you contend that there is a question of fact involved under this bankruptcy file, a question of fact for a jury, under this bankruptcy file?

Mr. Strachan: I think on the face of the evidence, there is no question of fact, because the evidence shows it occurred in the fiscal year in which the evidence shows it occurred.

The Court: Just limit yourself to my question. Is it a question of fact or a question of law?

If you show me where there are some questions of fact, [3860] maybe I will consider letting it go to the jury, but if there is no question of fact involved and it is a question of law instead, I should take the responsibility of saying what it means, whether I am right or wrong, and not leave it to 12 laymen to say what a court order means.

Mr. Strachan: I say that the construction of the petition and the order entered thereon are proper subjects for instruction.

The Court: What kind of construction? Legal or factual?

Mr. Strachan: Legal.

The Court: A question of law, then?

Mr. Strachan: Yes, sir; an instruction as to the legal effect only, and the court should not give any instruction which would direct the jury to find that the transactions occurred during the period other than that in which the records received in evidence showed that they did actually occur. [3861]

The Court: Mr. Fisher has suggested that the entire petition for confirmation of your third plan, and the entire order be made available as Exhibit 84 or as 84-A. What is your view on that?

Mr. Dixon: I have no objection to it, your Honor. If he wants the whole thing in, let's put it in.

We were trying to cut it down, but we have no objection to the whole petition and the whole order, but I want to correct one of counsel's statements here. This was not a sale to stockholders at all; it was bought by Mr. Rubin.

Mr. Strachan: That is what Mr. Hodge called it.

The Court: Who was the sale to?

Mr. Dixon: Mr. Rubin. He put up the money.

The Court: He was not a shareholder?

Mr. Dixon: He was not. He subsequently became a shareholder, but he was not at the time of the sale.

The Court: Mr. Fisher, you can have your option of being content with 84 that is now in evidence, or of getting a certified copy or a copy of the entire petition and order and substituting it.

Mr. Fisher: We will provide a certified copy of the petition and order. [3862]

* * *

The Court: The record will show the jury absent.

Mr. Williams: Your Honor, we don't plan to file formal papers on our motion for a directed verdict, so I will state the motion for the record.

The Court: Do you want to adopt the matter that you had in your previous motion, and then supplement it by such other matters——

Mr. Williams: I can adopt certain paragraphs of the motion, but in some of the others there have been changes.

If you wish to handle it that way, I can.

The Court: Where you can adopt, do so, and then add to it.

Mr. Williams: We will adopt the same motion that we made for a directed verdict at the close of the plaintiff's case, with respect to the following paragraphs of the first cause of action——

The Court: The following paragraphs which you list under the heading "First Cause of Action"?

Mr. Williams: Yes; in the motion we filed January 17th.

Paragraphs 1 and 4 through 9, inclusive.

Paragraph 2 will read as follows: Plaintiff has failed to prove that defendants, or either of them, engaged in any conduct which was outside the exemptions provided for the defendants by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act. [3865]

Paragraph 3 will read as follows: Plaintiff has failed to prove tnat defendants, or either of them, engaged in a combination or conspiracy in restraint of interstate trade or commerce or entered into or performed any contract in restraint of such trade or commerce. Furthermore, any cause of action arising from any contract or refusal to supply plaintiff with Valencia oranges, that is pleaded in the first cause of action, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

We will change the tenth paragraph to read as follows: Plaintiff has failed to prove the first cause of action attempted to be alleged in its second amended complaint.

We wish to add a Paragraph 11:

Plaintiff has failed to prove any fixing of prices of either fruit or of citrus fruit juices.

With respect to the paragraphs in our motion under the heading "Second Cause of Action," we will adopt the first, second, sixth, seventh, eighth, and ninth paragraphs of that motion.

The third paragraph will read as follows: Plaintiff has failed to prove that defendants or either of them, engaged in any conduct which was outside the exemptions provided for defendants by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act. [3866]

The fourth paragraph will be: Plaintiff has failed to prove that defendants, or either of them, combined or conspired to monopolize, or monopolized interstate trade and commerce in citrus fruit juices, or any citrus fruit juice processed in California and sold in interstate commerce in violation of the antitrust laws.

The fifth paragraph will read: Plaintiff has failed to prove that defendants, or either of them, had any specific intent or general intent or any intent or purpose to monopolize interstate trade and commerce in citrus fruit juices processed in California and sold in interstate commerce.

The tenth paragraph will read: Any cause of action arising from any contract pleaded in the second cause of action, or refusal to supply plaintiff with Valencia oranges, except the TreeSweet contract, is barred by the statute of limitations, since it was not pleaded in the original complaint.

The thirteenth paragraph of the motion will read——

The Court: 11?

Mr. Williams: Yes; 11 will read: Plaintiff has failed to prove the second cause of action attempted to be alleged in the second amended complaint.

Then we wish to add two more paragraphs. No. 12: Plaintiff has failed to prove that citrus fruit juices or, any citrus fruit juice, produced or processed in [3867] California, constituted an identifiable market or any area of effective competition that is subject to being monopolized.

And the thirteenth paragraph will read: Plaintiff has failed to prove that any appreciable part of interstate trade and commerce was monopolized or was the subject of a conspiracy or combination to monopolize.

The Court: Read the last one again.

(Record read by the reporter.)

The Court: With the exception of the last two grounds as to the second cause, 12 and 13, which you have just added, your motion is, in substance, with minor changes, the motion you heretofore made?

Mr. Williams: Yes; minor changes only, except for the last two.

The Court: Why don't you adopt your argument made upon the motion for a directed verdict at the close of the plaintiff's case, and supplement it by such other matters that you want to call my attention to?

Mr. Williams: All right. We will adopt the argument made at the close of the plaintiff's case, and I wish to state a few points to supplement that argument.

The first one relates to what is the cause of action in this case.

Antitrust actions are tort cases, as your Honor held in the Car Seal case. Therefore, they relate to injuries to [3868] the plaintiff due to acts of defendant.

In the first cause of action there are six acts, some of them being agreements and acts done under them that are alleged to have injured the plaintiff.

It is our position that the only one of those six acts, in view of the evidence in this case, that can be considered in any way to have given rise to a cause of action, is the refusal of Exchange Orange Products to give a processing contract to the plaintiff in 1951.

With respect to each of the other matters, there were no acts committed by the defendants that could have caused any injury.

The entering into of the several contracts could not, of course, have caused injury unless some act was performed to carry out the contract.

The Court: Doesn't the evidence show the contracts were carried out?

Mr. Williams: It does, but none of the acts in carrying out those contracts could possibly have injured the plaintiff for this reason: After the refusal the plaintiff did not have any single-strength orange juice to sell in the market, and therefore was

out of the market, and the only acts performed in carrying out the contracts aside from processing—which could not have injured the plaintiff—was the act of selling in the market place, and the [3869] plaintiff wasn't there with his products to be injured, so that following the refusal there was no act of the defendant that could have caused the plaintiff injury.

The Court: But by the same token, there is no possible way in which the refusal could have caused him injury if it had not been for at least the existence of the TreeSweet and Silzle contracts; is that true? If plaintiff had not pled the TreeSweet and Silzle contracts——

Mr. Williams: That is the plaintiff's position, as I understand it.

The Court: If he hadn't pled those contracts, and had merely pled a refusal, he certainly wouldn't have had a case.

Mr. Williams: That is true. He is pleading the setting of the contracts——

The Court: Therefore, you have to view the refusal in the setting of the contracts. In other words, you can't chop it up piece by piece and look at it.

Mr. Williams: That is not what we are trying to do, your Honor.

Our point is that the only act which caused injury was the refusal.

Now, the effects of that act, and the intent of that act, have a bearing on this case. But that is the only act, itself, that caused the injury. [3870]

The Court: In other words, you treat the contracts as if those were sort of conditions, things that were done, and the carrying out happened, but they were conditions which became the background, so that your argument is, therefore, the only act that caused injury was the refusal.

Mr. Williams: That's it.

The Court: Is that about it?

Mr. Williams: That is about the argument.

The Court: All right.

Mr. Williams: That the only overt act and conspiracy that caused injury, in our view, is this refusal to give a processing contract to the plaintiff in 1951. Plainly, also, there was no injury to the plaintiff before that refusal. So that narrows it down to this one point.

Now, this refusal under the pleading is really a two-fold refusal. It is a refusal to give a contract like TreeSweet, and it is also a refusal to give a contract like Silzle.

Before going into the difference between those two things, I would like to discuss briefly the plaintiffs' conspiracy theory. At the present time, in the present state of the pleadings, plaintiff relies solely upon conspiracy. He has two conspiracy theories. The first conspiracy is said to be one to restrain trade. The second conspiracy is said to be one to monopolize. [3871]

Now, what is the difference between these two offenses? The difference is in the objective of the conspiracy. In this case we have no illegal means to achieve a lawful end, so we are dealing with an il-

legal objective sought to be achieved by lawful means. So the difference is in the objectives.

If your objective is to monopolize, that objective necessarily involves, by the meaning of the term monopolize, the engrossing of substantially all of the market, and conspiracy to restrain trade is one where your objective is less than that, is not to engross substantially all of the market. It is to substantially hinder the operation of the competitive forces.

Taking up first the conspiracy to monopolize, it is our position that we are entitled to a directed verdict on that conspiracy for several reasons. First is that there is no evidence here that the commerce in California citrus juices is an identifiable segment of the law. That is true because of the Florida competition of citrus juices.

In single-strength juice, the evidence shows, Exhibit CH, that 92.9 per cent of all the single-strength orange juice in the United States is produced in Florida. California only has the remaining 7.1 per cent.

With respect to frozen concentrated orange juice, 88 per cent is produced again in the State of [3872] Florida.

There is no data on hot pasteurized concentrate in the record.

There is no evidence in the record from which the jury can determine that there is any appreciable advantage either in Florida juice over California juice or California juice over Florida juice, technically speaking.

The Court: While you are talking, I am just thinking, if you don't mind my interrupting, there is evidence that the California juice was, if not always, in most cases marked as California juice. There is evidence that TreeSweet, from Finley just the other day here, Finley gave as the reason why Sunkist got in and helped out when Chapter XI was going on, was that they didn't want something to happen to a California producer. There is evidence also that Sunkist wanted some California juice on the market. That is one of the reasons they gave for supporting TreeSweet.

Now, with that evidence in the record, if this was a question of fact, wouldn't the jury be entitled to infer that, therefore, the California juice was an identifiable part of the market and that it was defendants' intention that it be so?

Mr. Williams: I don't think so, your Honor, for this reason: That the evidence you have just stated related to something like a brand name. If you put the brand XYZ on something, that might be an identifiable part of the market [3873] in the sense in which you refer to it. But in the sense in which I refer to it there must be some competitive advantage one way or the other so that when they see the word California, they say, "This is either a better juice than Florida and I prefer it," or, "I prefer the Florida juice, and even if it was the worst juice in Florida, I prefer that."

The Court: There is nothing in the record, but we will concede that California juice is better than Florida.

Mr. Williams: In this case we are limited to the record. There is nothing in the record before the jury.

The Court: Maybe that is facetious, but could it ever be an issue here as far as Sunkist is concerned or Winckler-Smith? Wouldn't everybody in this litigation claim that California juice was identifiable and was better juice than Florida juice?

Mr. Williams: Your Honor, if I can avoid answering the question, my point is that it hasn't been proved.

The Court: We are not trying to get you in bad with the Chamber of Commerce.

Mr. Williams: I daresay they would find it hard to concede that California was not better than Florida, but I daresay that if you talked to people in Florida, you would find that they would find it hard to concede that California juice was better than Florida.

The Court: And that leads to the inference that the [3874] California juice and the Florida juice were identifiable parts of the market.

Mr. Williams: That is merely advertising talk, your Honor. It isn't concrete enough to show that there is an advantage or disadvantage in the market place to one or the other.

The Court: One may think there is an advantage, but doesn't that all lead to identifiable parts of the market?

Mr. Williams: I think you would have to go to the physical characteristics. If the flavor is different,

if you could show consumers had a preference, that there was some price differential normally between the two, say Florida was higher than California or California was higher than Florida, something that shows a competitive advantage, not just a claim asserted on the label or a can. It has to be some appreciable competitive advantage before you can separate out this market and say this market is subject to monopoly.

The Court: Competitive advantage would be the fact it has California on it. I don't know anything about juices, but when I was a United States Attorney, I had a letter from the United States Attorney in New Jersey who said, "Will you please find me the name of some supplier where I can get California oranges?" He said, "These Florida oranges drive me crazy with the seeds."

Mr. Williams: There is no question that navel oranges [3875] are a much better eating orange than anything that came out of Florida, but there you could show navels command a premium on the market place over Florida and Florida sold at a discount because they are poorer flavor and there are many seeds. But that has not been shown in this case. At least that is our position, your Honor.

The Court: I would be very interested in some cases on this point. We discussed it during instructions. You weren't here. The issue was simply this. Is this question of identifiable market, alleged California segment of the market, a question of fact or a question of law? We joined issue on that. Mr.

Dixon contended that it was a matter of law, and Fowle contended it was a matter of fact.

Mr. Williams: I think I was present, your Honor.

The Court: Maybe you were.

Mr. Williams: I was present.

The Court: Oh, yes; you were.

Mr. Williams: I think I also participated in contending it was an issue of fact.

The Court: Have either of you, you or Mr. Dixon, any authorities on that point?

Mr. Williams: Yes; I think we can find them. I recall a case of United States against Fairfax Linen Looms, in which one of the key points was the fact that linen rugs, which were involved in that case, had different physical [3876] characteristics than wool rugs. If you dropped a cigarette, it would merely scorch and not burn. The linen rugs wouldn't rot. You could have then in an entryway where people came in with wet feet and walked on them, or you could take them out on the lawn and use a hose to wash them and let them dry, and they would be all right. You couldn't do that with a wool rug.

The issue was whether this company that made the linen rugs, and they had a legal monopoly because they were the only ones making them in the United States, they had been enterprising, and there was no claim there was anything wrong with the monopoly itself, but the company was held guilty on the sale of linen rugs to the Government under a procurement contract.

A key point in that case was that these rugs constituted an identifiable segment of the market in

rugs because they had these different physical characteristics which gave them a different price and different preference, and this demand in the market place, than wool rugs. That is the kind of thing I am talking about.

The Court: Did they decide whether it was a question of fact or a question of law?

The Witness: It was a civil case tried without a jury, and the findings of fact in the case and the decision show that the court noted that there were these different characteristics. [3877]

One of the defenses made in that case is the same defense we are making here. They said, "We can't be charged with an attempt to monopolize linen rugs. You can't identify a market by label, an identifiable market. You have to show facts to show it, and we obviously haven't attempted to monopolize all of the rugs and, therefore, we have a complete defense."

The Court: What is the citation? Do you have it?

Mr. Williams: 63 F. Sup. about 32 or 36.

The Court: 63 F. Sup.?

Mr. Williams: Yes.

The Court: Oh, I thought you were citing a Supreme Court case.

Mr. Williams: This is just a District Court case.

The Court: This is some other District Judge who had to wrestle with the problem?

Mr. Williams: It is a very well-written opinion, your Honor. Like Mr. Dixon, cases come readily to mind when you participate in them. I participated in this one.

Then there is the footnote No. 5 that was cited to you in the other case, the Standard Stations case.

The Court: I couldn't make any sense out of that. I couldn't figure what the court was saying.

Mr. Williams: Your Honor, there is also something— [3878] do you have a copy of the Attorney General's report on antitrust laws?

The Court: Yes.

Mr. Williams: I believe I can find the page and cite to you the discussion in there that relates to the identification of market.

Mr. Dixon: I don't mean to interrupt, but I think the case cited in our requested instruction is on the point, that the Sherman Act has distributive effect, I mean commerce can be local in its nature and be restrained or subject to monopoly, and it doesn't have to be on a national scale, because if that were so, it would be impossible for a plaintiff to ever support a case under Section 2 without showing monopolization of the national market.

The Court: Was that U.S. vs. Griffith?

Mr. Dixon: No. Just a moment and I will get it.

The Clerk: 293 U.S. 268, Indiana Farmers.

Mr. Dixon: That is the case I had in mind.

The Court: I don't know what was the matter with my reading of the footnote. I may have been tired. Ordinarily, even if I have to read it three or four times, I eventually understand, but I couldn't make much out of the footnote.

Mr. Williams: I readily concede it is hard to understand. The discussion in the Attorney General's report is found at page 44. [3879]

The Court: Attorney General's committee on——

Mr. Williams: National committee to study the antitrust laws, report issued March 31, 1955. I will be glad to loan you our copy, if you wish.

The Court: Leave it here, if you will. I think I have it, but if I haven't, I can use yours.

(Mr. Williams handing book to the clerk.)

The Court: All right. I got you off the track on your motion. Go on.

Mr. Williams: The next point relates to intent. Now, conspiracy to monopolize is nothing more than a joint attempt made by agreement of two or more people. An attempt to monopolize requires specific intent to accomplish the end.

Now, if your conspiracy to monopolize becomes successful and achieves a monopolization, then I do not believe you have to have a specific intent, because you have achieved the offense, which is monopolization, which does not require specific intent, but merely general intent, under the Aluminum Company case decision.

But in this case it is our position that even with the conspiracy to monopolize, you must have specific intent, because here the conspiracy, so-called, did not have the necessary effect of accomplishing the result of monopolization.

The Court: Are you using the word specific intent as a word of art? I mean do you mean something more than a [3880] general intent?

Mr. Williams: Yes; I do.

The Court: Specific intent comes into the law

from the criminal side. It doesn't come in the law from the civil side. Maybe these lawyers and judges in writing about antitrust cases have appropriated the word and maybe it has some place, but as a matter of logic, it doesn't seem to me to follow.

The specific intent, we recently had the problem up here in this Circuit because of a decision in the Block case, and I went back and revised all my criminal instructions because of what the Circuit had said. When I got through revising them, I went back to the old mens re, the guilty mind, and pointed out certain types of crimes, felonies, required more than an intent to do the act, they required specific intent which, from the days of common law, was a guilty mind or an evil or bad motive. [3881]

That is what is meant in criminal law by "specific intent." And it is required ordinarily in felony cases, with three or four exceptions.

How "specific intent" finds its way into civil law bothers me, because you can't cite me any other civil field of law where there would be any requirement that there be a specific intent to commit a tort.

Mr. Williams: The reason for it is this, your Honor: This tort is an act committed pursuant to a criminal conspiracy. The attempt to monopolize is a criminal offense. It is a misdemeanor; it is not a felony, but it is a criminal offense. And it was held as early as the Swift case by Mr. Justice Holmes about 1906 that where you had an attempt to monopolize you had to have a specific intent.

I believe the Times-Picayune decision that you were reading the other night also refers to specific intent, where you have an attempt to monopolize.

Now, my point is that because a conspiracy to monopolize is an attempt by two people, two or more, that you must also have specific intent unless the crime goes so far that it achieves monopolization—of course the same is true of an attempt to monopolize—you do not require specific intent to show monopolization, if you go that far. And that is found in a decision by Judge Learned Hand in the Aluminum case. [3882]

The Court: Do these cases follow any logic? For instance, take Section 1, conspiracy, combination or contract to monopolize. Now, if you approach it on the basis of logic, first of all you would say——

Mr. Williams: Section 1 is only to restrain trade, your Honor. Section 2 is conspiracy to monopolize, attempts to monopolize, and monopolization.

The Court: Let's take Section 1. It is your argument that there should be specific intent under Section 1——

Mr. Williams: No. Only under Section 2, conspiracy to monopolize. Not to restrain trade, but only to monopolize.

The Court: Then if you concede specific intent is not required under Section 1, then as a matter of logic should there be specific intent required to monopolize, monopolization being a step further than restraint of trade? That is, you wouldn't have to have as much for restraint of trade as for monopolization.

Mr. Williams: That is right. You require more proof to show a conspiracy to monopolize than a conspiracy to restrain trade. [3883]

The Court: As a matter of logic, why should you have a specific intent on a conspiracy to monopolize and not have a specific intent on a conspiracy to restrain trade?

Mr. Williams: I don't know the answer except that in the attempt to monopolize cases it is well settled you have to have a specific intent, and what the court says is you need the specific intent, because you fall short of achieving the result of restraining trade or of monopolizing in the case of attempting to monopolize. And if that is true, it is well settled that then it follows, we say by logic, that a joint attempt also requires a specific intent, where you fall short.

The Court: Could this be a distinction? That the attempt to monopolize, which could be committed by an individual without a conspiracy, is the act of one individual, and therefore to know whether his act rises to enough dignity to be considered this attempt to monopolize there has to be proved a specific intent, but when you get into conspiracy to monopolize the very word "conspiracy" indicates that there was express or implied agreement between the parties, so by the very use of the word "conspiracy" you are presupposing that there was agreement, express or implied, by two or more people, to do the thing?

Mr. Williams: That may well be the answer.

The Court: And, therefore, as to conspiracy to restrain [3884] trade or to monopolize, the specific intent is not required, but when you get to an individual who has aggrieved somebody and has done an act which attempts to monopolize, in order to relieve that individual from the onus of his civil violation the law says you have to show more than that he did an act, and that you can infer from it that there was an attempt to monopolize, you have to show that he had a mental content, which we call specific intent.

In logic does that make sense?

Mr. Williams: That makes sense to me, but I think that it does emphasize that in a conspiracy to monopolize you at least have to have the intent—you have to have proof of the intent to monopolize as part of your proof of conspiracy.

Perhaps "specific intent" is not the right technical term, but you have to have proof of intent.

The Court: Is there any case which has discussed that this matter of conspiracy, and conspiracy to restrain trade, or to monopolize, implies the meeting of minds, expressly or impliedly, for a certain purpose?

Mr. Williams: No, I don't know of any, except the general cases on conspiracy, which say you must have the agreement, and when you join the conspiracy you must have knowledge of the objective and join with that knowledge, which does imply the intent.

In this case we say there is no evidence of intent

to [3885] monopolize whatsoever. In fact, there is even evidence showing that there was no intent to monopolize, because as Mr. Finley testified, and as Mr. Swayne testified, Exchange Orange offered a contract of the grower participation type to Case-Swayne.

If there had been an intent to monopolize, intent to engross all or practically all of the market, they certainly would not have gone to Case-Swayne and offered them a contract.

The Court: Before you pass this point now, and to be facetious for a minute, do you have any authorities on this specific intent being required on conspiracy to monopolize besides Williams on anti-trust?

Mr. Williams: No, I don't. I think maybe you convinced me I ought to take it back and change it.

I do think it requires intent. I will change my position from "specific intent" and claim there has to be intent.

The Court: I can go along with you on intent, because conspiracy implies intent.

Mr. Williams: Then we come to the point whether the evidence in this case supports submitting the case to the jury, is there enough evidence of intent to monopolize, and that is engrossing substantially all of the market. And certainly if you have this positive evidence of offering to [3886] Case-Swayne, it negatives the evidence of any intent to monopolize substantially all of the market.

The Court: You are not arguing to the jury now. If you were arguing to the jury, that would

make a good argument. The jury can draw all kinds of inferences, and they can believe or disbelieve a witness.

Finley said, "We offered it to Case-Swayne, but they didn't want it." The jury doesn't have to believe Finley.

Mr. Williams: Case-Swayne said the same thing.

The Court: They don't have to believe him, either. There is no reason why I would think they would, but the jury might want to believe that neither one of them was telling the truth, and this was just a gesture they were talking about.

We tell the jury that they don't have to believe any of the witnesses.

Mr. Williams: Let's look at some of the other evidence bearing on intent.

Our point is that there is no substantial evidence on which to submit this case to the jury under the conspiracy to monopolize theory, because of the absence of evidence of intent in the record. There is no evidence at all of any intent to monopolize hot pasteurized concentrate, but the complaint relates to citrus juices, which does include hot pasteurized concentrate. [3887]

With respect to frozen concentrate, the record shows that all that was done was that Exchange Orange entered into contracts with various other companies to have them make frozen concentrate for Exchange Orange under the Sunkist label for sale by Exchange Orange.

It is just like a patent owner having somebody

make material for him, but he does not license them to sell it, so he sells it himself.

Certainly there is no attempt to monopolize there, because their monopoly is no more than they already had by possession of the oranges.

So there is no attempt to monopolize frozen concentrate.

With respect to single strength, there is the Case-Swayne item I just mentioned, and there is another factor with respect to Case-Swayne, and that is that Case-Swayne consistently undersold Sunkist by about fifteen cents per case, according to Mr. Swayne.

Here was a price-cutter, and certainly if they were going to have a conspiracy to monopolize, he would be one of the first people to get out of the business.

During the year 1951, also, the single-strength orange juice was in surplus supply by reason of the large Florida pack. This is shown by the fact that the price in that year was lower than it had been in either of the two preceding years. It reached a new low in that year. [3888]

In fact, it was about the poorest year to try to monopolize a product, because it was a surplus commodity that no one wanted anyway.

If you look at Exhibit CH, which shows the amount of single-strength orange juice made each year by Exchange Orange for sale by it, or made for it by others for sale by it, from 1946 to '51, we find that in '51 they had 400,000 cases, the preceding year they had 210,000. Mr. Finley testified that

was a freeze year and they couldn't get enough good fruit to make a high quality product.

In every year preceding that they had more cases. 460,000 one year. '46 they had 750,000 cases. They have a history of decreasing the amount of single-strength orange juice made.

This was only normal, of course, because of the expansion of the frozen concentrate market. [3889]

As further evidence bearing on intent, which indicates that there was no such intent, is the explanation of Mr. Finley for why he didn't do business with Winckler, his unhappy experience in 1947, that Winckler couldn't make a good single-strength product with Citromat machines, and that the fruit was already contracted for at the time Winckler came around to get it.

We just don't find anything in the record that indicates that there was an intent on the part of these defendants and TreeSweet and Silzle to monopolize the market for California citrus juices.

So without reaching the issue of whether or not there was, really, a conspiracy—by that I mean the basic conspiratorial agreement to monopolize, whether that agreement existed—I say without reaching that we are entitled to have our motion for a directed verdict granted on the conspiracy-to-monopolize charge.

I would just like to mention, since our motion raises it, that the original complaint filed in this case was quite a different charge than that which appears in the amended complaint and which also is now found in the second amended complaint. The

original charge was not limited to citrus juices produced in California. It reads as follows:

"All of the defendants have for many years last past monopolized, attempted to monopolize, [3890] combined and conspired each with the other to monopolize the citrus fruit industry among the several states" * * *

The citrus fruit industry; not even citrus fruit juices.

"* * * among the several states and the District of Columbia, and have effectuated their monopolization of trade and commerce among the several states and the District of Columbia by doing, among other things, the acts set forth in paragraph 3 of the first cause of action herein."

That is *all* there was to the second cause of action in the original complaint. And we raise the question whether the statute of limitations bars the expansion of the second cause at this time. [3891]

The Court: It is not an expansion; it is a restriction.

The first complaint was shooting at the moon, and the amendments have further confined the issue.

If it would have been the other way around, I could see your point. If the complaint started out by charging you with conspiring to monopolize a small segment of the industry in California, and then they wound up with a second amended complaint charging you with monopolizing the whole industry, I would see some ground for complaint. But they have particularized more.

Mr. Williams: That is quite a different charge

than monopolizing only citrus juices in California. It is quite a different conspiracy, if you treat them as two conspiracies.

The Court: I have your point.

Mr. Williams: My next point relates to the conspiracy to restrain trade.

The Court: Can you be through by 4:30?

Mr. Williams: Yes. I have very little more.

The statements I made with respect to intent to monopolize also pertain to intent to restrain trade. And again the question is whether there is enough evidence in the record to justify submitting to the jury the issue of whether or not defendants conspired to restrain trade.

There is no evidence that any of the defendants anticipated that the plaintiff was going to ask for a contract [3892] in 1951, there is no evidence that they consulted with each other about it before the request was made; there is no evidence that any of the defendants were informed that the Exchange Orange had refused the request of Winckler. There just isn't any evidence indicating any agreement, which is an essential part of conspiracy, any agreement to restrain trade or to refuse the contract to Winckler.

There is, also, no evidence to show any public injury with respect to the restraint of trade. That is particularly true, because as I pointed out in my original argument, there were so many oranges to be processed, they were processed, they went into the channels of interstate commerce.

Furthermore, the supply of single-strength orange

juice was so low that year, lower than it had been in any of the two preceding years, that there was a clear indication that the public demand for single-strength orange juice was met and was not affected in any way by the conspiracy alleged here.

Now, the next point is one that I mentioned, also, on the original argument, and that relates to the Canella case, and the theory of the Kotteakos case.

I read the Blumenthal case, and the Carrigan case referred to by your Honor, and in both those cases we find that they accept the statement of law in the Canella case and in the Kotteakos case, but they held that on the facts in those [3893] cases that they had proved a single conspiracy and had put the rim on the wheel, so to speak.

The Court: Yes, but can you imagine a bigger wheel with less rim than that Blumenthal case?

Mr. Williams: That goes to questioning whether the court was right in its decision, your Honor. I don't know whether they were or not, but what they said was they found the rim and they conceded they had to find it. And our point here is that that is the law as stated in the Kotteakos case, and there has to be evidence from whence the jury can find the rim before the case can go to the jury.

In this case we have a different situation than existed in any of these four criminal cases, in that there it was admitted that each of the spokes constituted a conspiracy in and of itself, so that if you did not put the rim on the wheel you then had a series of small conspiracies stemming out from a central conspirator. [3894]

In this case the spokes do not constitute conspiracies. Each one is a legal act per se. So unless the rim is placed on the wheel and you have this illegal objective, you don't have any conspiracy at all.

Our position is that there is not sufficient evidence upon which to go to the jury on the question of agreement, because there is nothing shown with respect to agreement over and above what appears within the written contracts. There is no showing of any discussions, whether Winckler would get a contract—the same points I made a few minutes ago.

There must be some evidence of agreement over and above the contracts in order to put the rim on the wheel.

The next point relates to proof of damages and to the point that proof is speculative, and is so speculative that it ought not go to the jury.

First I will refer to the Silzle contract. The plaintiff has put in no evidence whatsoever as to the damages that might have accrued or did accrue to the plaintiff in 1951 by reason of its not having a contract like the Silzle contract.

Mr. Hodge testified about the TreeSweet contract, but nothing at all was said about the Silzle contract.

So our point is that the jury should be instructed that it cannot find any damages for the plaintiff by reason of the failure to get a Silzle contract. [3895]

Now, of course, the plaintiff wasn't entitled to both the Silzle contract and the TreeSweet contract.

He was only entitled, if he was entitled to either, to one or the other, but not to both.

Now, as to the TreeSweet contract, there is a peculiar feature in the language of the contract. Paragraph No. 2 states that the quantity of oranges to be supplied under the contract is entirely within the discretion of Exchange Orange Products. If Exchange Orange had chosen not to deliver a single ton of oranges to TreeSweet, it would not have breached the contract, and TreeSweet would not have been able to sue for nondelivery of oranges.

Plaintiff has chosen to rest its case upon a failure to give it a contract of that kind. It is clear that if the plaintiff had received a contract like the TreeSweet contract, Exchange Orange would not have been required to deliver any oranges under the contract.

So we have to go further than saying that there was a duty upon Exchange Orange to give a contract. We have to say there was also a duty upon Exchange Orange to supply oranges under that type of a contract.

Then the question is, how many oranges are to be supplied in performance of that duty? I think there is a question as to whether that question is one of law for the court or one of fact for the jury. [3896]

Supposing that a company sued for loss on a contract to build a house. Part of the reason would be the loss of the contract to build the house. The contract would be identified. You would have a particular house. It would not be an abstract thing

that had not been born. It would be something of a concrete plan. The only question for the jury would be, what would be the loss of profit on the building of the house?

So in this case, if there is a breach of duty here, that duty included not only the duty of giving a contract, but the duty of delivering oranges under the contract.

We raised the question whether that is a matter of law for the court, whether the court should decide how many oranges should have been delivered under such a contract, and should instruct the jury as to the number of tons. We frankly don't know the answer to the question we raised. It probably will rise again on the instructions.

Even if it is an issue of fact for the jury, is there enough evidence in this record to enable the jury to decide how many tons of oranges should have been delivered to Winckler & Smith in 1951? What standards would the jury have to decide how many tons should have been delivered?

The Court: Are these problems any different than those in the motion picture cases where there has been an exclusion of first-run pictures, for instance, and the question of [3897] damages comes up? Wasn't it the Eastman Kodak case where the Supreme Court said that plaintiff might show what business it had done and make estimates of its profit? Am I wrong about the case?

Mr. Dixon: That is correct, your Honor. The Eastman Kodak case is one and the movie cases are others.

Mr. Williams: They are a little different. You have a basis of past history of dealings there so you can estimate the profits.

In the Eastman Kodak case, the plaintiff had been a distributor of Eastman products for many years, and then Eastman tried to buy them out, and when the company wouldn't sell out, then Eastman put them on a different price list so that they had to pay more for their product. They had a much more definite standard to go to the jury than you have in this case.

The question here is whether you have any comparable definite standard or whether it is too speculative and too open to conjecture to go to the jury at all, or, on the other hand, the standards should be set forth in the court's instructions.

Those are the only points that we have to raise in addition to those made in our other argument.

The Court: I am not going to hear from Mr. Dixon.

The motion for a directed verdict is [3898] denied.

I am interested in this problem of whether an identifiable market is a question of law or a question of fact. I will look at what you have given me. That is a matter which we can consider on instructions. If either of you find anything more, let me have it. [3899]

* * *

Friday, February 3, 1956—9:00 A.M.

(The following proceedings were had in chambers outside the hearing and presence of the jury.) [3904]

* * *

Mr. Dixon: On 31, Judge, I have the note, but the record will show, I thought it was to be given with the modification, the insertion of the words, along with the other evidence in the case, after the word "evidence," in line 22, bearing on the question of the existence or nonexistence of the combination, and so on.

The Court: Well, let me see the transcript. I said, "Do you think it would be an erroneous statement of the law to insert on line 9 after Exchange Orange the words 'without good business reason?'

"Mr. Dixon: Well, I would like to think about that, your Honor.

"The Court: All right. What time has anybody got?"

And then there was the question of going home.

So we wound up on a proposed insertion of the words "without a good business reason."

All it does is say that, "You may consider these things in connection with all the other evidence in making a [3905] determination of fact." It is not, therefore, a formula instruction. So there would be no necessity to put in all the elements, and in that sense it wouldn't be necessary to put in the "good business reason," although I suppose the defendants will have an instruction along the same line,

that "You may consider whether or not the defendants had a good business reason and you may consider it along with all the other evidence in the case as to whether or not there was a conspiracy."

Mr. Dixon: I don't think it is proper in this instruction. I would like to consider whether it is even proper in the case as a whole, your Honor. One of the charges, of course, in the complaint is that the refusal to make them available was one of the parts of the conspiracy. I don't think if the jury would find there was such a conspiracy and that was part of it, the reason makes any difference, whether the motive was good, bad, or indifferent, because it is based upon the control which they had over the product.

The Court: You see, what you are doing by 31 is this: You are not stating any law to the jury.

Mr. Dixon: That is correct.

The Court: You are picking out what you would consider part of the gist of your case, and calling it to the jury's attention. It is in effect saying, "You may consider this along with all the other evidence in determining whether there is a conspiracy." [3906]

Mr. Dixon: That is correct.

The Court: That is all you are doing.

Mr. Dixon: That is correct. [3907]

The Court: By the same token the defendant would have a right to say—I am not going to give too many of these, but I am going to give enough of them to let each fellow show the theory of his case—the defendant, by the same token, would say,

"You have a right to consider this and this and this in determining whether there was a conspiracy," which would be true. You are merely calling attention to parts of the case.

Mr. Dixon: I think, Judge, that is true in a sense. I think that is probably true in connection with any instruction which relates to any particular part of the case, that could be said of any instruction that relates to any particular part of the case.

The Court: You would have three general types of instructions, maybe more. You first would have an instruction of a statement of the law. That is on one extreme. On the other extreme, you have what is called the formula instruction: If you find, blah, blah, blah, blah, then you find for the defendant. Or if you find so and so, then you find for the defendant.

I don't like formula instructions. They are dangerous. They present problems.

Then in between you have got these instructions where you call attention to certain elements. Then you have, also, another kind of instruction, where you have some law, and [3908] also call attention to its application to certain facts.

I am going to strike out "without a good business reason" on line 9, the words that I put in.

Have you finished making your record on this instruction, defendants?

Mr. Williams: Just a moment, your Honor, please.

Mr. Fowle: If the court please, we are not entirely clear as to the extent to which we did record

our objections to this proposed instruction, but there are three or four grounds on which I would like to make specific objections at this time. The first is that this instruction as drafted assumes that there is an obligation on the part of Sunkist or Exchange Orange to deal with the plaintiff.

Second, the term "refusal" or the expression "refusal to make oranges available" is used on several occasions throughout the proposed instruction without any qualification, and it is particularly used without any qualification as to the reasons for any such refusal.

Third, the instruction assumes that the plaintiff could actually have sold oranges or Valencia orange juice in competition, when the evidence actually is that he was insolvent.

Four, on line 16 I would point out beginning, "I charge you that if the plaintiff could not have secured Valencia oranges" and so on, it seems to me to be somewhat redundant, [3909] because it follows a sentence in which it is already said that such refusal operated to prevent the plaintiff from being able to process and sell.

Next I would suggest that the sentence beginning at line 16, to wit, "I charge you that if the plaintiff could not have secured Valencia oranges," and so on, is not really material here at all, because there is no showing in the evidence, or is there any indication in this instruction, that the defendants or the conduct of the defendants had anything to do with whether the plaintiff could have secured Valencia oranges elsewhere.

Next, there is no reference in the instruction or even so much as a hint that there were other reasons why the plaintiff was unable to secure Valencia oranges, that is, reasons other than the conduct of the defendants in the canning season of 1951.

When I speak of other reasons, I refer specifically, of course, to Morgan Ward and to the Florida situation.

The Court: The objection is overruled.

Most of your objections are based upon the contentions that the instruction assumes certain things.

There are no assumptions in it at all. There is no statement to the jury of any facts as existing. The instruction has to be viewed as just what it is, an instruction that calls attention to certain "ifs," if they [3910] find, and if they find, that they may finally consider these things if they find them in connection with whether or not there is a conspiracy.

I am going to give the instruction.

I am going to indicate here that I am going to give it, and I will consider later, as it fits in with other instructions, how many of these I am going to give. However, unless I advise you otherwise, it is going to be given.

Mr. Dixon: With the inserts your Honor made the other night on line 22?

The Court: Yes, they are already in the record.

Mr. Fowle: Just so that I might be sure at the moment. The only insert, as I understand, is the one in line 22.

The Court: Two inserts there. Line 22 reads: "might consider such refusal along with the other

evidence in the case as bearing on the question of the existence or nonexistence of the combination and conspiracy.'

32.

Mr. Dixon: These instructions, your Honor, from here and the next two, three or four instructions deal with the general question of monopoly control and what it constitutes.

I started out in this manner so that there can be some explanation to the jury of just what is meant by monopoly or monopoly control.

The next one, 32, just deals with—it is one of the tests of monopoly, you might say. [3911]

The Court: Well, let's take up 32. You submit it as a correct statement of law?

Mr. Dixon: Yes, I do, your Honor.

The Court: And the other incipient monopoly doesn't infringe upon your withdrawal of the attempt to monopolize?

Mr. Dixon: No, I don't think it does. We might consider striking that part of it.

The Court: You have got the word "trying" on the first line.

Mr. Dixon: This case, as I recall it, was a conspiracy to monopolize case. I don't think it was an attempt to monopolize.

The Court: "Trying."

Mr. Dixon: I don't think the attempt to monopolize charge was in the case. I might be able to check it very quickly here. As I said, some of these instructions on that were drawn at the time when both attempting and the conspiracy were in the case.

The Court: Before you check it, let me ask you this. A lot of these matters I am going to try to approach on the basis of logic first, unless I find somebody has got an idea or a case that prevents it. That at least makes more sense to me than trying to fit it into other things. Your present case is this: You are relying on a conspiracy, combinations and contracts and/or to violate Sections 1 and 2. [3912]

Mr. Dixon: Correct.

The Court: You are relying on a conspiracy to monopolize.

Mr. Dixon: Correct.

The Court: Under Sections 1 and 2, and you are relying on monopolization.

Mr. Dixon: Yes. Well, a conspiracy to monopolize and the monopolization is the Section 2 charge, but it relates to the juice part of the business, primarily single-strength juice, whereas the other monopoly complaint that is in the case, your Honor, which is either a question of fact or a question of instruction by your Honor, that there was a monopoly——

The Court: Of product oranges.

Mr. Dixon: Of product oranges, yes.

The Court: Let's see if I can summarize that. Your case is this: You are going to argue to the jury that there actually existed a monopoly of product oranges by the defendants.

Mr. Dixon: Which could have been and was a legal monopoly, shall we say?

The Court: An illegal?

Mr. Dixon: A legal monopoly. In other words, I don't question how they got it.

The Court: Then you are going to argue that your violations are the conspiracy and/or combination and/or contracts [3913] to violate and restrain interstate trade and commerce under Section 1.

Mr. Dixon: In juice.

The Court: In juice.

Mr. Dixon: That's right.

The Court: And then you are going to argue that there was also a conspiracy to monopolize the juice, Valencia juice market, under Sections 1 and 2?

Mr. Dixon: As well as the other part of the market, the citrus juice market, which includes frozen concentrates, and particularly single-strength Valencia juice, that represents that part of the total juice processed in California and sold in commerce.

The Court: All right. But you are going to argue a conspiracy to monopolize and you are going to argue actual monopolization of the juice market?

Mr. Dixon: Yes.

The Court: So that is your case, then?

Mr. Dixon: That is, your Honor.

The Court: You have got monopolize in it in two ways, the monopolization which you claim to exist on product oranges, which is only a starting point——

Mr. Dixon: Right.

The Court: ——and which you concede could be legal if they didn't misuse the monopoly [3914] power.

Mr. Dixon: Right.

The Court: But in your final point, as we discussed it, they have misused it by monopolizing the juice market?

Mr. Dixon: That's right. Doing those things under one which prevented the plaintiff from getting or manufacturing single-strength juice.

Mr. Fowle: I believe, your Honor, there is one point that needs a little clarification here. I am talking about the first cause of action, where you say that the first cause of action depends upon combination, conspiracy or contract in restraint of trade. It seems to me that the first cause of action really turns upon a conspiracy, and a conspiracy or combination alone, because the contracts which you speak of, the contracts as being in restraint of trade, that is to say, the TreeSweet and Silzle contracts, are not by themselves in restraint of trade, and I think they would be a problem in this case only if they were entered into pursuant to the conspiracy, so that in our view the first cause of action is in essence the conspiracy charge, and that's all.

The Court: What do you say to that? In other words, his point is that here the contracts alone, without the benefit of the combination or conspiracy, can't avail you?

Mr. Dixon: I don't agree with that, your Honor. That is the reason for the amended complaint. As I have tried to point out before, if the effect of those contracts was [3915] to restrain trade by fixing the price or tampering with the price structure at which California single-strength Valencia juice

was sold, that would be an illegal act in violation of the Sherman Act. It might not necessarily be the cause of damage to this plaintiff, your Honor, which is another question.

But I want to be in the position to argue, if necessary, that by reason of those contracts, pursuant to which Sunkist and Exchange Orange gave in effect practically all of the product oranges which they did not themselves process, to Tree-Sweet and Silzle, that the plaintiff therefore didn't have any of that available to it. Of course, they would have to perform the contract and deliver under the contract, so there wouldn't be any available to the plaintiff.

That was part of the combination and conspiracy, and by reason of the carrying out of those contracts, they gave all of the available product oranges that they had to TreeSweet and Silzle, rather than give any of it to the plaintiff.

The Court: I get your two theories.

Mr. Dixon: I am glad you mentioned that, your Honor, because it is confusing and is something that requires analysis and clarification, because it is not the position here of the plaintiff, and I again state it for the record, that any price-fixing contracts, I mean if these contracts had the effect of stabilizing prices, that they eliminated [3916] or damaged the plaintiff, because the plaintiff had nothing to sell in 1951 in the single-strength juice market.

The Court: Well, to boil it down, your contention is, although the contracts themselves may not

have been the cause of damage, they were so tied in with the rest of the problem that they have to be considered as part of the whole.

Mr. Dixon: Definitely.

Mr. Fowle: Your Honor, under the statute, the plaintiff may not complain here of anything that didn't injure him.

The Court: If something was a part of the picture—we come right back to what we talked about yesterday, I may be wrong, but my thinking is clear on that—if it was the refusal, the only damage came from the refusal, that the contracts couldn't have caused damage, but the contracts were a condition, they were part of the background upon which the alleged refusal acted, without them, without the contracts being there, certainly the refusal would have been no cause of action at all. Since the contracts are there as part of the background, possibly the refusal might be a cause of damage. You have got almost a question of causation, a condition, created by the contracts. Along comes a refusal, acting on the condition, and the plaintiff says "I am hurt."

If the contracts alone had existed, there had been no request and refusal, plaintiff couldn't seek damage. If there had been a request for fruit, without the contracts, [3917] and EOP had been doing all their own processing, and Winckler & Smith then come along and says "Give me some oranges," EOP could have said "Go peddle your papers. We are doing our own processing."

So you have got those contracts as an integral part of this picture. You can't say it is one or the

other did it. It is a combination of the two. My thinking is clear on that. I don't think there is any gap in the logic on that proposition.

Mr. Williams: May I raise another question there?

The Court: Yes.

Mr. Williams: It seems to me that the issue is a little sharper than just being a backdrop, that it is sharply cast in terms of, do the contracts impose a duty upon the defendant, Exchange Orange, to sell or to make available enough oranges under a contract like the TreeSweet, and they all go to the creation of the duty there. If they go to the creation of the duty, whether these contracts fix prices or not had nothing to do with the injury to the plaintiff. They had nothing to do with the creation of the duty. That is what seems to me to sharpen the issue, and so it comes down to that before the plaintiff can recover.

Mr. Dixon: I am glad that you—pardon me, your Honor, I did not mean to interrupt.

The Court: Go ahead. [3918]

Mr. Dixon: I am glad we have had this discussion, because we are getting down now to what I would call the guts of the case in this sense, that the monopoly power, and it is the contention of the plaintiff the monopoly power over the products available which were essential and necessary to this plaintiff if he was to stay in business, was vested in the defendants, that that power was represented by the fixing of prices at which the product was avail-

able, which is the only price at which they could be received from others, and so forth.

Now, starting with that premise, the defendants, exercising the power, made these contracts, particularly with TreeSweet, which took out and away from the open market, in other words, to that extent the plaintiff did not have access in a free market on free dealing terms, shall we say, to any part of the product oranges which went to the TreeSweet and Silzle under these two contracts. [3919]

Therefore, not being able to get then any oranges from any other source on a comparable basis to that at which the defendants made them available to TreeSweet and Silzle, the plaintiff was not able, not only for that reason, but also because the defendants refused to give them access to oranges on the same basis, and they couldn't, perhaps because they already, intentionally or otherwise, committed themselves to give all of their surplus to TreeSweet and Silzle, so the plaintiff was thus unable to get the product oranges from the defendants or any other source in this area, and hence was deprived of——

The Court: I understand your position.

Mr. Dixon: Now, to say that you can isolate——

The Court: I am in agreement with you. Let's save some time.

This is my secretary here, Miss Mahar. I am going to try to dictate something here as to what the plaintiff's theory of this case is, and we can put the same sort of thing in as to what the defendants' theory is. I think we have to somehow

tell the jury what this is about. We will get this typed up and we will see what we can do with it.

The last letter I had was "I." This will be "J."

"The court will now attempt to inform you as to what is the plaintiff's contention and what is plaintiff's theory of this case. Please bear in [3920] mind that these are, as stated, the contentions and theories of the plaintiff. The court will subsequently inform you as to the defendants' theories and contentions.

"The plaintiff contends first, as a preliminary matter and as background for the entire setting of the case, that the defendants Sunkist and EOP had a monopoly on product Valencia oranges"——

Mr. Dixon: Judge, I don't want to interrupt your thought, but in the complaint is the charge that Exchange Lemon had a comparable monopoly, indicating 90 per cent of the product oranges available.

The Court: ——"product Valencia oranges in the Southern California area"——

Mr. Dixon: That were available in California.

The Court: ——"and that Exchange Lemon Products, not a defendant, but an alleged co-conspirator, had a similar monopoly on product lemons in the same area.

"Plaintiff concedes that under the statutory exemptions applying to marketing associations this monopoly which the plaintiff contends exists could have been legal or illegal, depending upon the manner in which it operated, or depending upon the

defendants' acts and conduct in connection therewith." [3921]

Mr. Dixon: No, that isn't quite it, Judge. We don't contend that the actual monopolization of the product oranges and lemons in and of itself was illegal in any sense, since Sunkist and Exchange Lemon could legally monopolize——

The Court: Your question is on how they used it.

Mr. Dixon: That is correct. Then we start from the monopoly power.

The Court: I am just fumbling here.

Strike out the last thing you have and start again. [3922]

Mr. Dixon: May I make this suggestion?

"Plaintiff concedes that the defendants Sunkist and Exchange Orange could legally acquire a monopoly of the product oranges available for processing into citrus juice products in the California area, and likewise concedes that Exchange Lemon could also acquire a legal monopoly over the amount of lemons that might be available for processing into lemon citrus juice products in California."

The Court: Now, paragraph:

"We come, then, to what the plaintiff contends is the violation of the antitrust laws by the defendants, and what is the plaintiff's contention as to their alleged cause of action. Plaintiff contends that the defendants conspired, combined, and contracted to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act."

Mr. Dixon: Maybe we had better add there, "in

citrus juice products, particularly single-strength Valencia juice."

The Court: The term isn't "products." It is "California citrus juices."

Mr. Dixon: Particularly single strength.

Miss Mahar: "to restrain interstate trade and commerce"——

The Court: "in California citrus juices in violation of Section 1 of the Sherman Act." [3923]

Mr. Dixon: "particularly single-strength Valencia juice."

The Court: "Plaintiff further contends that the defendants"—I may have to go back over this, by the way.

"the defendants and co-conspirators conspired to monopolize the market in single-strength Valencia orange juice in violation of Sections 1 and 2"——

Mr. Dixon: There, Judge, "to monopolize the citrus juices, particularly single-strength Valencias."

The Court: Make that, "to monopolize the market in California citrus juices, and particularly in single-strength Valencia orange juice."

Mr. Dixon: "that are processed in California and sold in interstate commerce."

The Court: "that are processed in California and sold in interstate commerce in violation of Sections 1 and 2 of the Sherman Act.

"Plaintiff further contends that the defendants actually monopolized or exercise monopoly control over the California citrus juices, and particularly single-strength Valencia orange juice processed and

sold in California in interstate commerce in 1951, in violation of Section 2 of the Sherman Act.

"Plaintiff further contends that the defendants did and committed certain acts and engaged in certain conduct [3924] contained in six specifications of matters alleged to have proximately caused plaintiff's damage."

Let me add to that.

"These six specifications will be referred to in these instructions as the 'acts complained of,' and I will instruct you further as to plaintiff's allegations and contentions contained in these six specifications."

That is very crude, but it gives us something to work on.

Mr. Dixon: Yes.

The Court: Now, let's go back to 32.

Mr. Dixon: In connection with 32, Judge, it is possible to have a monopoly which would try to exclude outsiders from the business. I concede, of course, that the word "trying" implies an attempt.

The Court: I have a suggestion on that. Let me see if I can formulate it in a sentence here.

32, as I see it, is a correct statement of law in general. I think we will all agree that it is a correct statement of law. The trouble that I see with 32 is the use of the word "trying" and the word "incipient," which it might be argued are talking about attempts to monopolize. I had in mind doing something like this, after the general statement of law—this is too long:

"Bear in mind that the plaintiff does not charge

an attempt to monopolize, but charges the existence of a [3925] monopoly and the exercise of monopoly control by defendant over California citrus juices, and particularly single-strength Valencia juice, and it charges a conspiracy to monopolize in the same respect."

Mr. Williams: Your Honor, we can't agree that this is a correct statement of law, as applied to our present factual situation. This statement is taken from a case where you had 100 per cent of the market monopolized by these tobacco warehouses, and you had another warehouse trying to get into the market, and it was stipulated in the case that there was the buying time of buyers available to go to the other warehouse. So even though the statement may be correct as applied to the facts of that case, we object to its application to this case upon the ground that it is not a correct statement of the law as applied to these facts.

The Court: Your objection is generally that there is no basis in fact for any instruction on monopoly, isn't that what it amounts to?

Mr. Williams: It is more than that. For example, where it reads "trying to exclude outsiders," it ought to be "trying to exclude substantially all outsiders," not just "outsiders."

The evidence in this case only goes to one person.

The Court: Before you go ahead with your objections, let's clear up Mr. Dixon's end of it. He is proposing the [3926] instruction.

What do you think of some statement similar to

what I suggested, excluding any consideration of attempt to monopolize?

Mr. Dixon: Yes, I think something like this, so that the jury will not be confused. The Section 2 part of the case charges a conspiracy and combination to monopolize the citrus juices processed in California, and the monopolization.

In other words, it was effected particularly as related to single-strength Valencia juice.

The Court: I know, but you can't say that time and time again in these instructions. I just dictated one that we are going to work on as to your contentions. All I am interested in here is to cure what I thought might be a misunderstanding about the word "trying." "Trying" might apply equally to conspiring, and it might apply to attempting.

Mr. Dixon: May I make this suggestion, then, your Honor, in addition?

"No claim or contention is made by the plaintiff herein that the defendants, or either of them, attempted to monopolize." [3927]

The Court: Period.

Mr. Fowle: That is a sentence to be added at the end of this?

Mr. Dixon: In other words, that sharpens it up. I think with the subsequent instructions, your Honor, it will be perfectly clear what that addition means, so there can't be any confusion about it.

The Court: No claim or contention is made herein that the defendants or either of them attempted to monopolize.

All right. Strike out my suggestion and take

that one. Now, what are your additional objections to the instruction?

Mr. Williams: I stated one already.

The Court: Yes.

Mr. Williams: We object to this general statement, excluding outsiders from the business. Under plaintiff's claims it is confusing as to whether we are trying to exclude from the orange business, single-strength juice business, trying to exclude from the frozen concentrate business, trying to exclude from the hot pasteurized concentrate, or what it is. This phrase that plaintiff uses of "citrus juices, particularly single-strength Valencia orange juice," is confusing. Does that mean he is trying to limit the generality of the fruit juices phrase by saying "particularly single-strength orange juice," or does he wish to limit his case to only single-strength orange juice? [3928]

Is the jury going to have to consider whether there is a monopoly on hot pasteurized, a conspiracy to monopolize hot pasteurized? The same for frozen, the same for single strength?

It is highly confusing to use this general language, which doesn't specifically relate to what the charge is, and as yet the charge, of course, is not fixed.

Now, the phrase "incipient monopoly" has no application to this case. There is nothing in the evidence to indicate any incipient monopoly, and that phrase again is going to be confusing to the jury, to the prejudice of the defendants.

Then we have the objection there is no evidence

any combination effectively excluded outsiders from any part of the industry or from all of the industry of citrus juices. It is not clear whether this statement relates to intent. In this particular case, the acts that are charged would not have the necessary effect of excluding the plaintiff or anyone else and, therefore, there should be some reference to intent in the instruction.

The Court: All right. Can't we eliminate that "incipient monopoly," and just read "a monopoly"?

Mr. Dixon: May I again answer counsel——

The Court: I don't care about answering, because I have overruled the objections. Let's save some time. [3929]

Mr. Dixon: All right, Judge.

The Court: The objections are overruled.

Mr. Dixon: If you will bear with me for just a moment, your Honor, it will help us in the consideration of the subsequent request. The plaintiff was just starting or embarking in the business of processing frozen concentrates. That is a part, of course, of the citrus juices processed in California from product oranges, as well as from product lemons. To the extent that it is eliminated from the market entirely, of course, it would be damaged, but the product again is primarily single-strength Valencia oranges.

Now, with reference to your Honor's suggestion that the words incipient monopoly be eliminated, the contention again of the plaintiff is in Section 2 that the defendants conspired to monopolize the

citrus juice market, frozen and single strength, and monopolized.

Now, the jury might take the view that during the course of the conspiracy to monopolize, these acts were performed in the single-strength field which are complained of, and that they damaged the plaintiff, and they might at the same time take the view that the charge that they had actually monopolized the whole field here in California was not proved. In other words, it wouldn't be necessary for the plaintiff to prove nor for the jury to necessarily find that the monopolization was in fact accomplished, if they find that pursuant [3930] to the conspiracy to monopolize, which again might be called an incipient monopoly, these things were done which damaged the plaintiff.

The Court: Let me ask you this. If I strike out "or an incipient monopoly," which I don't think half of these jurors will understand anyhow, you could still argue what you just argued, couldn't you?

Mr. Dixon: Yes, I think I could, Judge. I don't want to take the time on it now but——

The Court: I will strike out "or an incipient monopoly."

Mr. Dixon: I don't have any objection to it.

Mr. Fowle: Your Honor, might I say the plaintiff should be compelled to decide and to make clear what it is that we are charged with having conspired to monopolize. To say we have conspired to monopolize the citrus juice market, particularly Valencia orange juice, seems to me to have an inherent fuzziness in it. We ought to be charged with having

monopolized a particular market, and to add to it all the time, particularly single-strength Valencia orange juice, seems to me to suggest in the same breath you are charged with having monopolized area A, and especially a segment of it. It seems to me it has an inherent fuzziness in it and is bound to confuse the jury. That exists all the way through all of the instructions on the monopoly phase of this case. [3931]

The Court: All right. The same objections will apply to 32, with the words "incipient monopoly," stricken out. They will be overruled. I will give the instruction.

Mr. Williams: I have one other point. Reading this again, it seems to me what the court was doing when it made this statement, it said, "A combination effectively excluding is a monopoly, and a combination trying to exclude is an incipient monopoly," because certainly a combination trying to exclude is not a monopoly, because a combination may be, say, 10 per cent of the industry, and maybe they have great plans, but it is not a monopoly, so that the trying to exclude outsiders ought to come out.

Mr. Dixon: I agree with that.

The Court: All right. The objections are overruled. I will give 32.

33? I think it is a correct statement of law. What are the defendants' objections to it? Where you can, repeat by reference other objections you have made.

Mr. Williams: The first question is the application here of the matter of monopoly power. Are we

talking about monopoly power only of oranges, or are we talking about monopoly power——

The Court: This is a general statement of law.

Mr. Williams: Our objection is to making a general statement of law that is not tied—in this case it should [3932] be tied, if it is to be given at all, to oranges.

The reason for that is this, that there is no allegation here, there is any power to fix the prices of oranges. I am afraid there is going to be confusion if this is given, because you are going to confuse that the monopoly power claimed over oranges involved some way a power to fix price of products, and that statement, of course, relates only to power to fix prices of the same products that are involved in the monopoly power itself. So it would relate only to the products oranges, and it would relate only to the power to exclude competition from the product oranges field, so we object to giving this instruction as a whole, because there is no indication of monopoly power over product.

The Court: Any further objections?

Mr. Williams: Yes. The word fix is ambiguous. It is possible it might be misconstrued to mean affecting, when it means the power actually to move prices up and down or to fix the price at a certain level desired by the person wishing to determine that price. There should be some statement relating to the existence of monopoly power to dominant concerns, if you are talking about power belonging to more than one concern.

Also, in this particular case, if there was any ex-

clusion of the plaintiff, it was by refusing to give him a contract to supply oranges under it, and as a matter of law that type [3933] of exclusion is not necessarily a matter of an exercise of monopoly power. If this instruction is given, it may give the jury the impression that the mere refusal indicates, which might have the effect of excluding the plaintiff in this case, that that is an exercise of monopoly power and illustrates that power, when that is not the case as a matter of law, so this should not be given or should be qualified to point out that a mere refusal to sell does not indicate any monopoly power, even though it might exclude the plaintiff.

The Court: Any others?

Mr. Williams: That's all.

The Court: What about adding this, "The words, 'to fix prices' refers to price fixing activities which tamper with or affect price structure in interstate trade or commerce."

Mr. Dixon: I think we have a requested instruction on that a little later, your Honor, that may amplify it some. As I said, it depends, of course, entirely on how you want to give these instructions.

The Court: We will see. I will give 32 with the suggested sentence.

Mr. Williams: We object to the additional sentence as making it even more vague.

The Court: Objection overruled. I may or may not give this additional sentence, depending on whether it is defined [3934] elsewhere. Unless I advise you, I will give it.

Mr. Williams: Can we have the additional sentence so we can write it down?

The Court: "The words, 'to fix prices' refer to price fixing activities which tamper with or affect price structure in interstate trade or commerce."

Mr. Dixon: Which tamper with——

The Court: Or affect.

Mr. Dixon: ——price structure?

The Court: Price structure in interstate trade or commerce.

Mr. Dixon: 34.

The Court: 34. Is plaintiff satisfied with it?

Mr. Dixon: You mean in its present form?

The Court: Yes.

Mr. Dixon: Yes, your Honor.

Mr. Williams: It is subject to the same objection we made to the preceding instruction No. 33, and we incorporate those by reference. It also involves a question under the Capper-Volstead Act which we stated with respect to plaintiffs' proposed No. 2, and we incorporate that by reference.

Further, the instruction is not related to conspiracy, which is the issue involved here. It is not monopoly power of an individual company. There should be an element of [3935] conspiracy referred to in the instruction. This indicates, in fact, this relates really to the attempt to monopolize, rather than the conspiracy, because it is individual acts of Sunkist and Exchange Orange, not acts done pursuant to conspiracy.

The Court: Well, the plaintiff is charging, apart from conspiracy to monopolize, defendants did mo-

nopolize. But, of course, it is tied in here with restraining competition, exercising their monopoly power.

Mr. Williams: My understanding of the amended complaint is not that Exchange Orange and Sunkist monopolized anything, but that Exchange Orange, TreeSweet and Silzle and Exchange Lemon monopolized.

Mr. Dixon: You are wrong in that respect, counsel. The charge is made there was control of the products oranges.

Mr. Williams: Well, you are not charging illegality in control of the products oranges, as I understand.

Mr. Dixon: No, but they exercised it to restrain competition, and they certainly violated the law. I don't care——

Mr. Williams: Just take the first sentence, "Monopoly power is the power to exclude a competitor from a market."

The only application that might possibly have to this case is relating to the market for the sale of products oranges. [3936]

Mr. Dixon: That is a general statement. It is background for what follows.

Mr. Williams: It is the same argument I just made with respect to the other one, so I won't repeat it, with respect to the preceding instruction. It is going to be misleading to the jury and prejudicial to talk about monopoly power in the abstract without pointing out there is no question of monop-

oly power of products, that it only relates to oranges.

The Court: Well, that isn't true.

Mr. Dixon: No.

The Court: Plaintiff is contending, No. 1, that there was a monopoly power in these defendants over product oranges. He is not complaining that is right by itself a violation or the cause of his injury.

Against that background of that situation, he says defendants may or may not use that power properly. Then he charges that they conspired to violate the Sherman Act, that they conspired to monopolize juices, and that they actually monopolized or exercised monopoly power over juices.

Mr. Williams: The essence of his charge, as I understand it, is that the defendants conspired with TreeSweet, Silzle and Exchange Lemon to misuse this monopoly power over oranges to gain some advantage in the products market.

The Court: The conspiracy——

Mr. Williams: That is the only misuse of the power is [3937] by using it in the conspiracy. Any other misuse of it apart from conspiracy would be an attempt to monopolize.

Mr. Dixon: I think counsel is probably correct in what he says, your Honor. I don't want to go over it again. [3938]

The Court: Now, wait. Are you going to concede your instruction is bad?

Mr. Dixon: No, I don't concede this instruction is bad, your Honor, not at all.

The Court: Are you standing on it?

Mr. Dixon: Yes.

The Court: Then in what respect is he correct?

Mr. Dixon: That the monopoly power that we are talking about in this instruction——

The Court: Is this backdrop monopoly power?

Mr. Dixon: That is right. It is not a monopoly power over the citrus juices that may be processed therefrom, because that is the product——

The Court: I understand your position. Now, maybe you are willing to make the instruction clearer.

Mr. Dixon: I thought it was clearer, but sometimes when we dictate these things we have things in mind that may be clear to us but may not be clear to anyone else.

Mr. Williams: We would just like to add that this, to us, is inconsistent with the statement that is now a part of the preceding Instruction No. 33—excuse me—Instruction No. 32, that no claim or contention is made herein that the defendants, or either of them, attempted to monopolize.

Mr. Fowle: In other words, your Honor, this instruction would tend to lead the jury away from the idea of a [3939] conspiracy and focus their attention on what is being done by two of the supposed members of the conspiracy alone, and without reference to the conspiracy.

Mr. Dixon: I think it is part of the conspiracy, because the conspiracy charge is that they set the price, and they had the monopoly power to do so.

If we don't show they had the monopoly power

to do so, then mere fixing of the prices of product oranges wouldn't mean very much.

I think, your Honor, as I read this over again, if I insert the words "over product oranges" here in line 5, after the word "power," and on line 9, after the word "make," insert the words "product oranges," that then it would be clear what the "monopoly power" refers to that is being talked about in this instruction.

The Court: All right.

What was that on line 9?

Mr. Dixon: Strike the word "them" and insert the words "product oranges."

The Court: Now, let me read it again.

All right. Any further objections to 34?

Mr. Williams: Yes. In its present form it would ban any choice of customers, because it takes the position that you must exercise monopoly power—in other words, the right to choose customers in such a way as not to restrain [3940] competition. It seems to us that it would imply that they had no right to select their customers at all.

The Court: Restrain competition and select customers are two different things.

Any further objections?

Mr. Wililams: That is all.

The Court: I will give 34 with those two amendments. The objections are overruled.

35. You say "as a part of such plan or scheme."

As a part of a conspiracy or combination. Because we haven't referred in here to any scheme or plan.

Mr. Dixon: "As part of such combination or conspiracy they refused to * * *"

The Court: Yes. I tentatively approve the first sentence.

The second sentence, however, gets into this formula field.

Mr. Dixon: That is right, your Honor, it does.

I found it difficult in framing these instructions to stop in the middle.

The "market" referred to there, I think it is clear—it is to me, at least—is the interstate market. That is line 17 I am talking about, your Honor.

The Court: I am looking at the words "such market" up in line 12. Shouldn't it be over the interstate market? [3941]

Mr. Dixon: The market is the market previously referred to. The citrus juices that are processed in California and sold.

The Court: Then that is all right; "such market" refers back to that.

Mr. Dixon: It is clear to me as it is. [3942]

The Court: Now, let me look at it again.

Wouldn't it be better to strike out, "and caused the plaintiff damage, you should find for the plaintiff," and insert after the word "market" on line 17, "then you may find that the defendants violated the antitrust laws"? Because you still have the question of particular acts, causation——

Mr. Dixon: That is a good suggestion.

The Court: ——and various other things.

So it now reads, line 16: "plaintiff as a competitor of Sunkist, TreeSweet and Silzle in such market,

then you may find that the defendants violated the antitrust laws."

And the second sentence, "Sunkist and Exchange Orange, or either of them, were endeavoring to extend their control, and that as a part of," if you took out "such"——

Mr. Dixon: The reason I had the words "scheme or plan" is because that is frequently used by the Supreme Court or other courts where a conspiracy is the thing that is charged, because it presupposes and assumes the existence of a scheme.

The Court: This is based upon conspiracy to exercise monopoly control?

Mr. Dixon: Right.

The Court: Then we should take out "either of them." [3943]

Mr. Dixon: No, for this reason, Judge: The contracts here were made by Exchange Orange. Sunkist sold——

The Court: This is what I am thinking about. You will see in a minute. "either of them," insert tentatively, "by a combination or conspiracy were endeavoring," and so forth, "and that as a part of such combination or conspiracy."

It was the original thought you had, because you said "such scheme." Otherwise unless you get conspiracy or combination in above, you make it look as though it was an individual act, and this is slanted towards the conspiracy.

Mr. Dixon: I see your point. I think it is well taken.

The Court: All right. With those suggestions, what are the defendants' objections?

Mr. Williams: Well, the first sentence is a repetition of the last four or five lines of instruction No. 34, where it says, "Sunkist or Exchange Orange must exercise their monopoly power over the product oranges," and so forth, and that is repeated to some extent in the first sentence.

Of course, under the Capper-Volstead Act if their position in oranges is entirely lawful, and by deciding to whom they will sell—suppose they decide to make none themselves and sell to everyone, they are not extending control over the market in any way, so this would ban action that is permitted to them under the Capper-Volstead Act and [3944] the general laws.

Mr. Fowle: The point, your Honor, is that the objection to the first sentence is that under the Capper-Volstead Act Exchange Orange and Sunkist could do exactly what is set forth in that first sentence.

Mr. Dixon: What are you talking about—35?

The Court: 35.

Mr. Fowle: 35, yes.

They could do all the processing themselves, and that would extend their control, and that would probably have the necessary effect of eliminating a competitor or eliminating competition. But that is perfectly lawful under the Capper-Volstead Act.

The Court: I know. Let me read it a minute.

I propose this: That we strike the first sentence

of 35 and go directly from 34 to the second sentence of 35.

I think there is merit to Mr. Fowle's suggestion.

Mr. Dixon: There is, your Honor.

Mr. Fowle: I think the same point might well apply to the last sentence of the previous instruction. That is No. 34.

The Court: They must exercise in such a manner as not to restrain competition.

Mr. Dixon: I thought I had there, originally——

Mr. Fowle: If Sunkist decides to take over the [3945] processing 100 per cent, that is going to restrain competition; but it wouldn't be unlawful.

The Court: In 34, couldn't you do this? On about line 12, "must exercise their monopoly power over the product oranges of their grower members without engaging in a combination or a conspiracy to restrain competition?"

Mr. Fowle: With outsiders. Without engaging in a conspiracy or combination with third parties.

Mr. Williams: Exchange Lemon might be a third party. You would have to exclude it, also.

Mr. Dixon: This instruction deals with particular facets of this case.

It demonstrates, I think, very well the difficulties in trying to charge on particular things in an antitrust case, upon which instructions should and are usually given.

Certainly 35 in its present form——

The Court: Let's go back to 34, because we have the same problem there.

"must exercise their monopoly power over prod-

net oranges of their grower members in such a manner as not to illegally restrain" putting the word "illegally" in there would do it. That is a suggestion.

Mr. Dixon: Yes.

The Court: In other words, I think you gentlemen are right, they could actually be restraining competition by, [3946] for instance, processing all their oranges, they would effectively restrain it. I think the word "illegally" might do it, tentatively, in 34. "illegally restrain competition."

Mr. Williams: Where do we define what "illegally restrain" means?

The Court: It is being defined all the way through here.

Now, let's see what that does to 35.

On line 5, you could say, "could not be illegally exercised."

Mr. Williams: You wouldn't need the first sentence of 35 in any event.

The Court: Let's take that up again. The worst that can be said about that is that it is repetitious. We will take that up later.

This is line 5. "such control could not be illegally exercised so as to extend their control over citrus juice by illegal means which had the necessary effect."

Then we come down to what the illegal means are.

"if you find that by a combination and conspiracy they were endeavoring," and so forth, "and as a part of the combination they refused to make

oranges," and so forth. At least in my thinking that improves it.

Mr. Dixon: I agree, your Honor.

Mr. Williams: It improves it, but—— [3947]

Mr. Dixon: Of course, I have been so close to this case I see things here that are clear to me, again, but——

The Court: Don't feel badly. The defendants didn't see that, either, in 34, with all the objections they made, until they got to looking at 35.

Mr. Williams: That's right.

The Court: Those instructions let you argue whether there was a monopoly, and if there was, whether it was legal or illegal.

You are going to argue there wasn't any conspiracy, I suppose.

Mr. Fowle: That is right.

Mr. Williams: These words begin at line 7 and continue into 8, after "illegal means," the words "which had the necessary effect of eliminating a competitor." I don't think they add anything.

Mr. Dixon: You have to show the application of it to this case. That, again, is one of the charges made in the complaint.

The Court: Let's relax a minute.

(Discussion off the record.)

The Court: Going back to 34, I am going to insert the word "illegally" in front of the word "restrain" on line 13, and apply all the objections heretofore made, and overrule them and give the instruction. [3948]

On 35, I am going to insert the word "illegally" before the word "exercised" on line 5, and the word "illegal" before the word "means" on line 7.

Have you finished your objections to 35?

Mr. Williams: No. This line 8, it says, "eliminating a competitor." I think that should be "eliminating substantially all competitors," because we are dealing here with conspiracy under Section 2.

The Court: No. The only monopoly he talks about here is this background monopoly.

Mr. Dixon: That is right. This is the exercise of this monopoly power.

The Court: Any other objections?

Mr. Williams: In line 11 we have added, "by a combination or conspiracy," but it should be, "by the combination or conspiracy charged." Then it should be limited to the first or second cause of action.

They are not talking about a combination or conspiracy in the abstract. We are talking about a particular one.

It raises the Capper-Volstead question whether Sunkist and Exchange Orange can conspire. [3949]

The Court: Well, on line 13, since we have referred to conspiracy on line 11, I think on line 13, it should be "such" again. "Is a part of such."

Mr. Williams: My point is that when it says, "a combination or conspiracy," it could be construed by the jury to mean a combination or conspiracy only between Sunkist and Exchange Orange.

The Court: That could be. The jury doesn't have to find that all of the——

Mr. Williams: That raises our Capper-Volstead objection, that these two companies can't conspire.

Mr. Fowle: Also, the charge in the complaint is that there was a five-part conspiracy.

The Court: The jury doesn't have to find it all.

Mr. Fowle: But I think in this particular instruction, however, where you are just referring to the conspiracy generally, there should be a reference to the conspiracy charged in the complaint.

The Court: You could say, "by the combination or conspiracy charged," line 11.

Mr. Dixon: I have no objection to that. That's all right. There again I thought that was what we were talking about.

The Court: All right. Any further objections?

Mr. Williams: The mere fact of making contracts with [3950] TreeSweet and Silzle referred to in lines 12 and 13 is not enough to show they were endeavoring to extend their control into the citrus juice market.

The Court: Here the refusal and the contracts are coupled together.

Mr. Williams: And there is no intent required here, and there should be at least an intent.

The Court: Well, there is going to be an intent as to conspiracy from the conspiracy instructions. This can't all be used. For instance, "each party must be"—referring to Judge James' instructions —"must be actuated by an intent to promote a common design."

Mr. Dixon: Yes, Judge, I read that over or

scanned it. I haven't read it all. I think his charge relates primarily to criminal conspiracy.

The Court: On reflection, I do, too, and whether we can pull stuff out of it or whether we would do better by putting our own conspiracy provisions in there, I don't know yet.

Mr. Dixon: When we get to it, I would like to discuss that.

The Court: Any other objections to 35?

Mr. Williams: I believe it should state "such refusal" referred to in line 15 was made with the purpose and intent of eliminating the plaintiff.

Mr. Dixon: Oh, no, I don't think that is necessary here. [3951] We have a charge on that in the previous sentence.

The Court: Any other objections?

Mr. Williams: That's all.

The Court: Overruled. I will give 35.

36. Are you content with 36?

Mr. Dixon: I am, yes.

The Court: What are your objections to 36?

Mr. Williams: The first paragraph has no relation to the facts here, because there is insufficient evidence to go to the jury on the question of whether the defendants had the power to determine the price and quantity of Valencia oranges. The evidence is unequivocal that the prices were below the $40 price of Sunkist, that these lower prices were charged by others, including Morgan Ward, and TreeSweet bought at the lower prices.

The Court: This is your general objection, that the background monopoly is not in the case?

Mr. Williams: No, this is a specific objection that there is insufficient evidence to go to the jury on the power to determine the price or the quantity of Valencia oranges going to processors.

The next point is that the instruction as a whole is repetitious of the two preceding instructions, 34 and 35, that the word "otherwise" here in line 19, "otherwise controlling trade and commerce" is vague and indefinite, and [3952] "otherwise controlling" is not a violation of the antitrust laws in and of itself. There may be legal means of controlling trade and commerce. That when you add lines 21, 22 and 23, which refer to specific juice products, instead of just referring to citrus juice products, which you find in line 20, that you are again confusing the issues as to what this case is about.

The Court: Before you go any further, let's hear from the plaintiff first as to paragraph 1. As I understand the objection, it is that there aren't enough facts in this case to justify this contention of monopoly power, background power over products oranges.

Mr. Dixon: With reference to that, it is the contention of the plaintiff it is almost a fact on which a judge could instruct——

The Court: Look, I am just speaking——

Mr. Dixon: I know you don't do that.

The Court: I understand your position and I understand theirs. I have already ruled on it before. Is there anything else in there that bears on that problem?

Mr. Dixon: I didn't understand the question, your Honor. Just a moment.

The Court: I think there is sufficient evidence.

Mr. Dixon: This particularizes the application of the power to the products as to price and quantity that were [3953] available to independent processors.

The Court: You are content with 36?

Mr. Dixon: Yes.

The Court: The first paragraph. What about this "otherwise controlling"? I don't think that adds a lot.

Mr. Dixon: I don't suppose it does. That is language frequently used in the courts in connection with monopoly and restraint.

The Court: All right. Any other parts? The "otherwise controlling," I have stricken.

Mr. Dixon: Then let's add the word "or."

The Court: "Or monopolizing." Any further objections? I stopped you so we would not forget what that was.

Mr. Williams: We suggested that the last three lines come out, 21, 22 and 23.

The Court: That is upon the objection you have been making about the reference to California citrus juices and particularly—this should be "trade and commerce in California citrus juices." That is the term we have been using. Line 20, strike out "products."

Mr. Dixon: In drafting these things, again this illustrates, your Honor, you have to repeat.

The Court: Any other objection to 36?

Mr. Williams: We object there is no evidence of frozen concentrate being restrained and monopolized. [3954]

The Court: Any others?

Mr. Williams: That's all of our objections to 36.

The Court: Overruled.

Mr. Dixon: 37, your Honor, deals with the question, is intended to deal with the right of the defendants to make processing contracts and the application of that right to the evidence in this case.

The Court: Let me read it then.

At 16 you start to get into trouble, "must be true processing contracts and not devices which are resorted to, to restrain trade or to monopolize * * *."

Again you would have to have certainly illegally restrain trade or illegally monopolize.

Mr. Williams: We have a further objection to the term, "true processing contracts," as vague and indefinite and object to its use at all.

The Court: This isn't tied down to conspiracy necessarily. It is part of your contention that the contracts under Section 1 illegally restrain?

Mr. Dixon: Yes, Judge. Possibly it should be tied down. I don't know. I will take a look at it. Well, I couple it there with the refusal.

The Court: So I understand this, this from about line 20 or 19 on is—I am paraphrasing—for you to decide whether the contracts entered into were true processing [3955] contracts or whether they were contracts which had the purpose and effect of extending the monopoly control by elimi-

nating competition between Sunkist and other processors.

In other words, this, then, speaks, apart from the conspiracy or combination, of the allegation in the complaint that the defendants, eliminating the allegation of conspiracy and combination, by contracting had the intended and necessary effect of restraining trade and commerce.

Mr. Dixon: You are right, Judge, and yet——

The Court: So it raises the issue of whether you are contending that in addition to combining or conspiring to restrain trade and commerce, you are also contending that they by contracting contracted to restrain trade and commerce.

Mr. Dixon: Contract and refusal.

The Court: Together.

Mr. Dixon: Yes, together. Now, the contracts and the refusal are two of the acts specified as being part of the combination and conspiracy charged. I think if the jury, for instance, let's assume a verdict was returned here under any theory whereby the jury might be required to make findings, just to illustrate what I am talking about, I think if the jury made these two findings or if the court were hearing it and making findings of fact, and found these two findings, I think they would probably constitute sufficient factual [3956] evidence to support any judgment or verdict.

The Court: The instructions given to the jury plus the verdict are the equivalent of findings. So the question is again, it is your contention that apart from conspiracy or combination, the contract-

ing and the refusal constitute an offense under Section 1?

Mr. Dixon: I would say so, Judge. The question is whether or not it ought to be, just in the interest of safety, as far as the plaintiffs are concerned, tied into and made a part of the combination and conspiracy.

The Court: I would agree with you. I think the contracting, at least in logic, is equally effective in Section 1 as are the combination and conspiracy, when coupled with refusal. The contracting by itself or the refusal by itself, and certainly the two of them together, I think, would constitute a violation. But whether someone else might agree with you or not is another thing.

Mr. Dixon: It is probably safer to word this instruction so that it would be part of the combination, because a verdict for the plaintiff would then be clearly based upon that fact, if there was a combination and conspiracy, and it wouldn't be necessary to search the whole record through to determine the basis of it any further than that. So there would be no law or novel question which would be presented in that sense by such an instruction. [3957]

I think perhaps in the interest of avoiding the presenting of this precise factual situation to any reviewing court, it ought to be tied in to the combination charged in the complaint.

In other words, your Honor, again to get back to the purpose of this instruction, it is to charge on the processing contract part of the case covering

the right of the defendants to make processing contracts, but, however, indicating to the jury that that right to make a processing contract, so-called, is not an absolute right which is without limitation. The processing contracts as such are nowhere defined, to my knowledge, in any of the marketing acts.

In this case, it seems to me that if I were on the other side, I would take the position, "Well, these are proper processing contracts." The plaintiff, however, of course, contends that they were part of a scheme and device charged in the complaint. It would therefore seem to be one of the questions of fact for the jury to determine as to whether they were in fact such contracts as are legally permitted, shall we say, within the right given to the defendants under the Capper-Volstead Act, to make processing contracts.

It is my judgment and contention, of course, that they are not, particularly where they are made in this atmosphere and have the effect of appropriating to the use of TreeSweet and Silzle substantially all of the product oranges that [3958] the defendants had available for processing purposes to independent processors.

That is what this instruction is intended to apply to and to present that phase of the contention of the plaintiff to the jury in its proper perspective.

It might be solved in this way, your Honor. I am just thinking out loud now. Starting 19, something like this:

"One of the questions of fact that you are called

upon to decide in this case is whether these processing contracts"——

The Court: See if this does it. On line 22, after the word "which," insert "were made pursuant to the"——

Mr. Dixon: This is line 22, Judge?

The Court: Yes, after the word "which."

Mr. Dixon: All right, your Honor.

The Court: "Were contracts which were made pursuant to the combination or conspiracy charged," and then drop down to 27, put a comma in after "contracts," strike "such latter effect," and proceed on down to "ments" on line 30.

Now, let me read it the way I would have it, about line 15. I am also inserting the word "illegally" before "restrain trade" and "illegally" before the word "monopolize," both on line 17. So that it would read like this:

"However, such contracts must be true processing contracts and not devices which are resorted [3959] to, to illegally restrain trade or illegally monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which EOP entered into in 1951 with TreeSweet and Sibele were true processing contracts or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of extending the monopoly control of Sunkist and EOP over citrus juices that are processed in California and sold in inter-

state commerce by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts, when coupled with any refusal of the defendants Sunkist and EOP products to make oranges available for the plaintiff under comparable arrangements."

Does that do violence to what you are talking about?

Mr. Dixon: No. I think it tends to clear it up, Judge. This is one that was very difficult, frankly, for me to frame, because I got into the problem of going the whole length or not, I mean making it a formula instruction to cover all possibilities. [3960]

Mr. Fowle: Your Honor, before we make any objections, if we make any to this instruction, I wonder if we might have a couple of minutes to look it over.

I might say that I personally found this instruction very confusing.

I had a little trouble trying to figure out what was behind it.

With these changes, some of the things that we would have objected to have been obviated.

The Court: A lot of it is a defendants' instruction.

Mr. Dixon: That is right. I intended to anticipate by this——

The Court: I will look it over again. I will sip my coffee here, and we might relax a minute.

(Discussion off the record.)

Mr. Dixon: Shall we strike the word "the" in line 23 and put the word "any"?

The Court: I think the word, line 25, "by" there should be inserted "or by eliminating."

Apparently this would refer both to the conspiracy to monopolize, and it would refer, also, to the conspiracy to eliminate competition.

How does it read if you put the word "or" in front of the word "by" on line 25?

Mr. Dixon: I think instead of "any" we should use the [3961] word "such." That is on line 23.

Mr. Williams: Where does "such" go?

Mr. Dixon: On line 23. Strike the word "the" and put the word "such."

Doesn't that show definitely what is being referred to?

Mr. Fowle: What does it refer back to?

The Court: It starts out with this legal monopoly at the very beginning.

Mr. Dixon: That is what I had in mind. I don't know whether I did it.

The Court: That eliminates that "or" on line 25.

Mr. Dixon: A little word sometimes makes a lot of difference.

The Court: Because the monopoly power was legal, and therefore——

Mr. Dixon: Yes.

The Court: Have you finished reading it yet?

Mr. Fowle: I am not quite through.

Mr. Dixon: I think if we are going to put a comma after "contracts," we should make it a

period and then strike the last sentence. In other words, stop there, because the refusal is tied in——

The Court: You say put a period where?

Mr. Dixon: Leave the period after the word "contracts" and strike the last sentence is the way I am thinking now. [3962] I am reading it as revised——

The Court: Going back to line 19: It is for you to decide whether the contracts * * * EOP, TreeSweet and Silzle, were true contracts, or were contracts pursuant to a conspiracy charged.

Mr. Dixon: Which had the purpose and effect.

The Court (Continuing): Which had the purpose and effect of extending such monopoly control by eliminating competition, when coupled with any refusal.

In other words, you are coupling the contracts with a refusal. That is your theory.

Mr. Dixon: The thing that bothers me is leaving the "when coupled" up in the air.

The Court: It might have to go in earlier.

Mr. Dixon: That is what was disturbing me, Judge. Just a minute, here.

The Court: If you are going to put it in earlier, you would put it in line 21 after the word "Silzle."

Contracts entered into with TreeSweet and Silzle, when coupled with any refusal of EOP to make oranges available, were true processing contracts, or whether they were contracts, and so forth.

Mr. Dixon: You are right, there, it makes it one sentence.

The Court: I will have her retype this if we agree [3963] on it.

This is just a matter of grammar now.

Mr. Dixon: The thing that bothered me was the grammar.

The Court: This language coming after the word "contracts" on line 27, put a period there, and then going along with line 27, pick up these words, which we are going to insert earlier, "when coupled with any refusal of the defendant Sunkist or Exchange Orange Products to make oranges available to plaintiff under comparable arrangements"—pick that language up, and stick it in on line 21 after the words "TreeSweet and Silzle." Then it will read like this——

Mr. Dixon: That makes sense.

The Court: Beginning with line 19:

"It is for you to decide whether the contracts which EOP entered into in 1951 with TreeSweet and Silzle, when coupled with any refusal of the defendant Sunkist or EOP to make oranges available to the plaintiff under comparable arrangements, were true processing contracts," and so forth and so forth.

Mr. Dixon: That is a good instruction.

Mr. Fowle: What possible connection is there, your Honor, between a refusal, on the one hand, and the question or whether or not the other contracts are true processing contracts?

I don't see any connection. I would think the defendants [3964] would have to object to this in-

struction on this one ground, among others, that it is so confusing that it is very difficult to understand what it means. It lumps together Sections 1 and 2 of the Sherman Act, intermingles them so that it is difficult for me, and I would think very difficult for a jury, to sort out just what propositions of law and what questions of fact are really being submitted as the result of this instruction.

The Court: I don't think so.

Here is the skeleton of the instruction: It starts out and says defendants may have a legal monopoly and they may process their own juice, or may make processing contracts. But they may not illegally restrain trade or illegally monopolize by such contracts. Then it is for you, the jury, to decide whether these contracts, coupled with any refusal, were true processing contracts, which would be legal, or whether they were contracts that were made pursuant to the combination or conspiracy and had the purpose and effect of extending the monopoly control and eliminating competition.

Mr. Fowle: Well, assuming for the moment there is something to what you say, Judge, it seems to me that whether or not the contracts were true processing contracts doesn't have anything to do with it. What the plaintiff is driving at, it seems to me, is whether or not these [3965] contracts, themselves, along with the refusal, were a part of a conspiracy. And I don't see what difference it makes whether they are true processing contracts, or not. That injects a question here that isn't

necessary for the jury to decide, and it is a vague term. [3966]

The Court: What you are really talking about is this: that maybe the term should be "legal processing contracts."

Mr. Dixon: That is all right.

The Court: Supposing we said, going down here, in line 11 they use "valid processing contracts," however, down in line 15, "such contracts must be" —could you put "legal" there, "legal processing contracts and not devices," and so forth? "It is for you to determine whether these contracts, coupled with a refusal, were legal processing contracts, or whether they were made pursuant to a conspiracy," and so forth.

Mr. Fowle: That wouldn't cure the objection, because, as I understood it, we were all pretty much in agreement that the contracts standing by themselves were legal processing contracts. They were legal contracts; there was nothing wrong with them. It is a question of what the purpose was behind them and whether or not they were part of a conspiracy.

The Court: That is where the refusal and the contracts are coupled together.

Mr. Williams: Your Honor, I am not clear in my mind, from the discussion, whether this instruction is intended to be under Section 1 of the Sherman Act, which condemns illegal contracts, or whether it is under Section 1, the part which condemns conspiracies and combinations.

The Court: I will tell you what I think it is

under, because of the words "pursuant to combination or conspiracy," [3967] it is therefore under Section 1——

Mr. Dixon: Or 2.

The Court: ——and 2.

Mr. Dixon: That is right.

Mr. Williams: That doesn't quite answer my question whether it relates to contracts or relates to conspiracy, or is it an amalgamation of both?

The Court: We have taken the proposition out that the contracts alone and the refusal would be a violation. We required that there be a finding of conspiracy or combination.

Mr. Williams: Then this is objectionable because there is no issue—it is objectionable because it poses the issue to the jury whether these contracts are legal or are illegal, and that is not in issue. They are really legal in themselves.

The Court: It doesn't pose the question of the contracts alone. It poses the question that if the contracts were a part of a conspiracy, and it couples them with the refusal.

Mr. Williams: It is immaterial in this case, your Honor, whether—if the contracts were part of a conspiracy, once you assume that, that they were part of the conspiracy, it is then immaterial whether they were legal or illegal, because they are one of the means used to further the conspiracy.

Mr. Dixon: I agree with that.

Mr. Williams: So the issue need not go to the jury to [3968] decide whether they were legal or

illegal. If they find a conspiracy, then it is an immaterial question.

The Court: Actually this is largely your idea of a defense instruction?

Mr. Dixon: In a sense it is, Judge. This is not facetious, counsel.

The Court: If it is, you want to object to it?

Mr. Fowle: Then it isn't a very good one from our point.

Mr. Dixon: The plaintiff again concedes that all these things that are set forth in this instruction, that they can do that; but where we start to part company with the defendants is that we say, under the general principle of law that a legal contract, when used to effect an illegal purpose, becomes illegal——

The Court: I understand your position, and I am trying to understand——

Mr. Williams: Ours is that that is immaterial.

The Court: It seems to me, however, that your instruction is too narrow, if it is going to represent your view of the case. In other words, it seems to me that the contracts and the refusal could be properly considered under either the conspiracy to restrain trade and commerce, the conspiracy to monopolize, or the monopolization.

Mr. Dixon: Right, your Honor.

The Court: Therefore it seems to me there ought to be [3969] "or" again before the word "by," and there ought to be another phrase in there to really present your theory on the contracts.

I am going to show you what I think it ought to

be, and then we can pass it up and you can study it over the noon hour. [3970]

* * *

Mr. Dixon: Judge, I will be glad to give you my thoughts on this.

The Court: First of all, if it is worse than we were before, then let's go back to the old one.

Mr. Dixon: No. I think my first suggestion would be to eliminate the second page, starting with the word "or" on the first line. On line 27, strike the words "or monopoly," and add the words "and monopoly," and on the next line, strike the words "affecting or," and then on line 30, I think maybe the tense is wrong. "Were." It relates back to acts previously done.

The Court: I picked that up out of yours.

Mr. Dixon: Yes. I noticed it was the same. The next line, strike the words "or of," and insert the word "by."

The Court: Well, then, we had better go back to what you have got there on this.

Mr. Dixon: This does it, Judge, with those slight changes, as far as I am concerned.

The Court: Then we go back to yours, because the only real addition, outside of dressing it up, was the changing of the word "by" to "or" and adding the phrase on the second page. Go back to 37 as it was, and let me make one suggestion and then see how that reads. [3971]

Mr. Dixon: All right.

The Court: Now, on line 21, after the word

"Sikle," you have that business about "when coupled with," going in there.

Mr. Dixon: Yes.

The Court: And on line 23, after the words "Sunkist and Exchange Orange Products," then inserting in between the lines, "from the Valencia product oranges to the," and striking "over." So that it reads, with the context and so forth, "were true processing contracts"—strike the word "true" and put in "lawful."

"were lawful processing contracts, or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of extending such monopoly control of Sunkist and EOP from the Valencia product oranges to the citrus juices which were processed in California and sold in interstate commerce, by eliminating * * *"

Mr. Dixon: I have no objection to that. I think that in a sense clarifies my thought.

The Court: Well, wait a minute. I can make it even clearer. That insert there between 23 and 24, it might be clearer if you said, "from the monopoly control, if any, of Valencia product oranges to the citrus juices," so that it [3972] will read, "had the purpoee and effect of extending monopoly control of Sunkist and——"

Well, that won't do it either. [3973]

Mr. Dixon: We have already identified monopoly control by the word "such" in line 23, that is why I suggest that you don't need it in again.

The Court: I think we will go back to the revision. It is easier to read now.

Have you got the revision on 37?

On line 16, change the word "true" to "lawful."

And on line 17, strike out "to illegally restrain trade," and we will stick it in below. Stick it in on line 18 after the word "charged." It makes better sense that way.

Mr. Dixon: "* * * to illegally restrain trade" —yes.

The Court: Now, on line 25, change the word "true" to "lawful."

And on line 27, strike out "monopoly" and put in "conspiracy."

That was miscopying by my secretary.

Mr. Williams: And "and" instead of "or."

The Court: And on line 28, strike out "or" so it will read "effect of extending."

And leave the word "as" like I changed it, and then the insert I gave you before, "may have already had over product oranges to the citrus juices." This is modifying the word "extending," "extending such monopoly control as Sunkist and EOP may already have had over product oranges to"—no comma in there, and then a comma after "oranges," "to the citrus [3974] juices that were processed."

On line 31, change "or of" to "by."

Then we go on the second page to the words "such contract," period, and strike out the rest.

Mr. Dixon That is agreeable to the plaintiff, your Honor, as revised.

The Court: Let me read it once more.

Mr. Fowle: Do you wish to hear from us?

The Court: Not yet. I wish to read it once more. "Change 'valid' on line 11 to 'lawful.'"

All right. What are the defendants' objections?

Mr. Fowle: I am sorry to say, your Honor, that we have a number of them. I hate to prolong this.

In the first place, we object to that portion of the first sentence which states, begins on line 3, "that are available to independent processors," and so on. If it is going to be stated that the defendant Sunkist is permitted under the law to acquire a legal monopoly over Valencia oranges, I think it should stop there. That is to say, if we are entitled to have a legal monopoly over Valencia oranges, it isn't just the Valencia oranges that are available to independent processors. It should refer to Valencia oranges generally. [3975]

Mr. Dixon: Well, I think that might be a good suggestion. Let me make this suggestion. "The amount of Valencia oranges and such product oranges as are available for processing into citrus juice products by all persons."

Mr. Fowle: Well, that is products oranges.

Mr. Dixon: Well, I don't care if we start there.

The Court: Why don't you say "Valencia oranges and Valencia product oranges"?

Mr. Dixon: I was willing to start with "the amount of Valencia oranges," start there, and strike out the words "available to independent processors for processing into citrus juices," if you want to use that term again.

Mr. Fowle: Why not leave it just "product oranges"? That carries with it everything that——

The Court: He is talking about something else. He suggested it read, "legal monopoly over the amount of product Valencia oranges"——

The third line, "that are available for processing into citrus juice products."

He inquires whether you want citrus juices instead of citrus juice products. It doesn't make any difference.

Mr. Fowle: I don't think that makes much difference, but it seems to me the point here is that Sunkist is permitted under the law to acquire a legal monopoly over the amount, or over product Valencia oranges, period, and you [3976] don't need to limit it to anything else.

The Court: "over product oranges that are available for processing." I struck out the "amount."

Mr. Fowle: I don't think you need to go on to say "that are available for processing." That is the point I have.

Mr. Dixon: The reason that is important, counsel, is that that is the problem that is involved in this case.

The Court: That is all that is involved here. Your objection on that point will be overruled. You mean we shouldn't single out "and processing into juices"?

Mr. Fowle: I don't think we should single out the products available to independent producers.

Mr. Dixon: We took that out.

The Court: We took that out, so it reads now, "acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juices," and so forth.

Now, what is your next one? That one is overruled.

Mr. Fowle: The next point, and this deals with the next sentence, the sentence beginning line 5, which says:

"Sunkist and Exchange Orange could in 1951 have processed all such oranges,"

and so forth,

"and not have made any of them available to independent processors, if they had cared to [3977] do so."

In the first place, under the evidence here, I think it is perfectly clear Sunkist or Exchange Orange could not have processed all such oranges.

The Court: Let me see. "Could legally." Is that what you mean? "Could have legally processed." You are not talking about the physical thing. "Could have legally processed." That's a good suggestion.

Mr. Dixon: Yes, that is acceptable.

Mr. Fowle: It still leaves the inference, this whole sentence leaves the inference that they had the capacity to do it and that if they had wished to exercise a whim to use their entire capacity, they could have done that, or they could have made up their minds for no reason at all to make some of it available.

The Court: That objection is overruled, because the next sentence takes care of that.

Mr. Fowle: Well, this sentence ends up, your Honor, with the phrase, "if they had cared to do so." The "cared to do so" has nothing to do with this. Whether or not they process the oranges that are available is an economic situation.

The Court: "If they had been able to and cared to do so." That's a good suggestion, Mr. Fowle.

Mr. Fowle: Well, we still dislike and object to the phrase "and cared to do so." I don't want to push too far. [3978]

The Court: Now it is coupled with "had been able to and cared to do so."

Now, the next objection?

Mr. Fowle: The next objection is that in the following sentence, the one beginning on line 9½, I guess it is, it doesn't make it clear that the citrus juices processed might have been sold to prospective buyers, including independent processors. I don't know whether I have made that clear.

The Court: I know what you mean. Let's see. How about adding at the end of the sentence——

Mr. Fowle: I would suggest after the word "buyers" on line 15½ on my copy, there be a comma, and the phrase "including the independent processors."

Mr. Dixon: If it comes at the end of the sentence, it reads better.

The Court: Yes, I was going to put it at the end. It reads better at the end of the sentence, Mr. Fowle.

Mr. Fowle: All right.

The Court: "including independent processors."

Mr. Fowle: Well, then, as Mr. Williams points out, the phrase "in interstate commerce," is too broad. It should be "intrastate or interstate commerce."

Mr. Williams: Leave out the phrase entirely. "including independent processors" and then period.

The Court: That's all right. Any objection to that? [3979]

Mr. Dixon: Oh, I guess not.

The Court: What's the next one?

Mr. Fowle: The next objection is that the alteration of the word "true" to the word "lawful" does not really meet the objection that we raised this morning.

The Court: You mean in your Volstead Act exemption?

Mr. Fowle: Well, it is partly that, but it is also that by using the word "lawful" or "true," either one, in front of the expression "processing contracts," the instruction tends to flag the proposition of the legality of the contracts themselves. We have taken the position that these contracts are in and of themselves lawful.

The Court: Well, that objection is overruled. If you want a better word, all right, but the sentence shows, "must be lawful processing contracts and not devices," and so forth, so the general objection that in all events these contracts were legal is overruled.

Now, what other objection do you have?

Mr. Fowle: Just a second. I am trying to figure out what changes are in this sentence.

The Court: I suggested putting the "illegally restraining trade" down in a different place to make it read a little better. [3980]

Mr. Fowle: The next objection, your Honor, is in the sentence beginning on line 21, "It is for you to decide"——

Mr. Dixon: May I go back for a moment?

I don't mean to interrupt, but I think perhaps a period should be put on line 5 after the word "thereof," for this reason——

The Court: Wait a minute. "including independent processors"?

Mr. Dixon: Should be stricken, yes.

The Court: No. Why?

Mr. Dixon: An independent processor is of course a prospective buyer. TreeSweet and Silzle, in a sense, are independent processors, there is no question about that. They are included within the realm of prospective buyers——

The Court: I am just particularizing. Your objection is overruled on that.

Mr. Dixon: All right.

The Court: Now go ahead.

Mr. Fowle: The next objection is that in the sentence beginning, "It is for you to decide," on lines 21 and 22, it is not made clear that the refusal of the defendant Sunkist or Exchange Orange to make oranges available must also have been pursuant to the conspiracy charged here.

I think maybe it is made clear that Silzle and TreeSweet [3981] contracts must have been pursuant to the conspiracy, but I don't think it is made clear that the refusal of Sunkist or EOP to give comparable arrangements to the plaintiff must also have been pursuant to the conspiracy.

The Court: Well, that logically follows.

Line 24, after "EOP" insert "pursuant to"—what did you say, combination or conspiracy? Which one comes first?

Mr. Dixon: Combination or conspiracy.

The Court: All right.

Mr. Fowle: The next objection is this: There is the statement there beginning along about line 28, "had the purpose and effect of extending such monopoly control as Sunkist and Exchange Orange Products may have already had"——

The Court: "over product oranges."

Mr. Fowle: ——"over product oranges, to citrus juices that were processed in California."

We have what I think is a fundamental objection to this, because it isn't charged in the complaint that there was any scheme or plan to extend the monopoly, if there was one, of Sunkist or EOP over product oranges, to an additional field, that is, citrus juices produced from the oranges.

The Court: It is not charged in those words, but it alleges that you did have the monopoly control over product [3982] oranges, and then alleges these other things, so inferentially it is just a choice of words.

Mr. Fowle: My point is this, Judge: That the complaint charges that there was a conspiracy on the part of five people, five organizations, Sunkist, EOP, ELP, TreeSweet and Silzle to monopolize citrus fruit juices. And to say here that there is an effort to extend the monopoly of EOP and Sunkist from one field to another doesn't follow the charge in the complaint.

The Court: I don't think you read the complaint right.

Mr. Fowle: It has been amended.

The Court: I have the amended complaint here. This is what it says:

"Sunkist, EOP and ELP have a monopoly control over the production and distribution of fresh citrus fruit." [3983]

Mr. Fowle: But the charge with respect to the conspiracy, though, is that it is a conspiracy on the part of five people to get a monopoly. So that what the charge really is is this: that the monopoly control of EOP and Sunkist is pursuant to this conspiracy somehow or other being used to obtain a monopoly for five organizations instead of two.

Mr. Dixon: No. That doesn't necessarily follow.

Mr. Fowle: That is what the complaint charges.

Mr. Dixon: A judgment is sought against the defendants who, under this charge, are alleged to have had and to have exercised monopoly power over the product oranges by doing these things, into the citrus juice field.

The Court: We could maybe obviate this. It all hinges on the word "extending." We could obviate

this by saying, line 26, "or whether they were contracts which were made pursuant to the combination and conspiracy charged and had the purpose and effect of monopolizing the market in citrus juices," and take out this "extension of monopoly control over product oranges into juices."

The word "extending"—you start out with three people alleged to have a monopoly in one thing, and then you talk about extending it. Strictly speaking, that isn't what the plaintiff claims. He claims that this alleged monopoly over product oranges was the backdrop, was something that existed. With that setting, they then allege a conspiracy of the [3984] five of them to monopolize.

Can you work it that way and get rid of the word "extending"?

Or you can say, "the purpose and effect of also exercising monopoly control over the citrus juices."

Mr. Williams: That is not an offense.

The Court: Monopolizing?

Mr. Williams: Exercising monopoly control.

Mr. Dixon: It may be if it is done for the purpose of eliminating competition or maintaining a monopoly.

The Court: "* * * had the purpose and effect of monopolizing the market in citrus juices"?

Mr. Dixon: Judge, here is the thought that I have on this. I think we are making headway on it.

On line 27, "combination and conspiracy charged"—that is the two of them, Sections 1 and 2, so "combination and conspiracy charged," and

"had the purpose and effect of restraining interstate trade and commerce and monopolizing."

Strike all that.

"* * * had the purpose and effect of restraining and monopolizing interstate trade and commerce"——

The Court: Do you want "and" or "or"?

Mr. Dixon: In the alternative.

The Court: "* * * interstate trade or commerce"——

Mr. Dixon: ——"in citrus juices, particularly single-strength [3985] Valencia juice, processed in California and sold in interstate commerce."

That ties it right in to both Section 1 and Section 2. And it applies this processing contract to the facts.

I think that will do it, Judge.

The Court: You are leaving out the last two lines, then?

Mr. Dixon: They could go in, yes. It shows how it was done by eliminating competition, which would be a proper part of the charge.

The Court: Let me see if I have got it as you have.

Line 26:

"which were made pursuant to the combination and conspiracy charged and had the purpose and effect of restraining and/or monopolizing interstate trade and commerce in citrus juices, and particularly single-strength Valencia orange juice, processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such

processors in the interstate market for such products as were processed under such contracts."

Mr. Dixon: I think that is clear, and I don't think it can possibly be subject to objection. I presume it will be by defendants.

Mr. Fowle: I approve of the alteration so far as it [3986] goes.

The Court: Let's go ahead with your objection now.

Mr. Fowle: "* * * affecting or extending such monopoly control as Sunkist and Exchange Orange Products"——

Mr. Dixon: That is out.

Mr. Fowle: The last objection we had, your Honor, was to the phrase "by eliminating competion between Sunkist and such processors in the interstate market."

The evidence would indicate in our view that the Silzle and TreeSweet contracts, rather than eliminating competition, stimulated competition. [3987]

The Court: Can we eliminate the last two lines?

Mr. Dixon: What's that?

The Court: Stop right at "commerce" on 30.

My point is different from Mr. Fowle's. Reading it grammatically, you have "monopolizing by eliminating competition." I don't know whether that follows.

Mr. Dixon: It does. It follows "monopolizing by eliminating competition." I mean it applies to either "restraint of trade" or——

The Court: Objection overruled. We will go ahead with the objections.

Mr. Fowle: You monopolize by eliminating competition of the plaintiff or others who are not involved here, but you are talking about eliminating competition between Sunkist and TreeSweet and Silzle, and my point is that the contracts, the Silzle and TreeSweet contracts stimulate competition, and they didn't eliminate competition between Sunkist and Exchange Orange or TreeSweet and Silzle.

The Court: They eliminated competition if the jury decides the effect of them was to substantially fix prices.

Mr. Williams: If they didn't get any oranges, they would have been out of business, possibly. To that extent, they furthered competition.

Mr. Fowle: Your Honor, if it is the price-fixing element that lies back of this phrase, "by eliminating competition," [3988] which I suspect was lying back of it, but isn't expressed here, then we should have the general objection that price fixing was not pleaded in the amended complaint and the evidence does not support price fixing in any event.

Mr. Dixon: Well, it is tied in, Judge. I don't suppose it makes much difference whether it is taken out or it is in.

The Court: Well, it looks all right to me.

Mr. Dixon: I think it is all right as it is myself.

The Court: All right. Objection overruled.

Mr. Williams: I had an objection, your Honor, in that it is immaterial whether the contracts were lawful processing contracts or were not. Perhaps I made that point this morning.

The Court: I think you did. That is overruled.

Mr. Williams: Then we will rest on what I said this morning.

Mr. Fowle: I take it your ruling is this will be given as modified.

The Court: Yes. Let's go back to K, which the girl typed over the lunch hour. I will hand you copies of it. There should be a comma on line 29, after 1951. And on page 2, a comma after 1951.

Well, I have to go upstairs to see one of the Circuit Judges.

(Interruption.) [3989]

The Court: Is K tentatively okay?

Mr. Dixon: The only suggestion that I have, your Honor, is maybe a typographical error, where it should be "combined or conspired" on line 30.

Mr. Williams: Is there any distinction between combination or conspiracy?

The Court: I don't know.

Mr. Dixon: It is just the language of the statute.

Mr. Fowle: What line is this?

Mr. Dixon: 30. It would infer that the two things had to happen.

The Court: All right.

Mr. Fowle: We have a couple of suggestions, your Honor.

We don't want to barge into what is a statement of the plaintiff's theory here, but in several places the word "defendants" is used alone, and I think you mentioned this morning, yourself, that perhaps you would want to couple that with "and alleged co-conspirators."

If you will look at line 21, the beginning of that fourth paragraph, "We come to, then, what plaintiffs contend are violations of the antitrust laws by the defendants." That is repeated in three or four different places.

The Court: "by the defendants and co-conspirators." That is all right, isn't it?

Mr. Dixon: I didn't notice that, myself. [3990]

The nature of the combination will be set forth, I assume, in the charge. In the last paragraph of page 1, "contend that the defendants and co-conspirators," the words "and co-conspirators" should be taken out, because of course no judgment or anything can be acquired against the co-conspirators.

The Court: I know, but you contend that they all conspired.

Mr. Dixon: Yes. But they don't all have to.

The Court: I know, but this is your broad contention. It seems to me it ought to be in line 22—"defendants and co-conspirators," and it ought to be in line 24, "defendants and co-conspirators."

Mr. Fowle: Would you go along with calling them "alleged co-conspirators"?

We don't care what you call TreeSweet or Silzle, but we would like to have Exchange Lemon called "alleged co-conspirator."

The Court: I don't see any objection one way or the other.

Mr. Dixon: All right, Judge, put it in as "alleged co-conspirators," if you want it in.

Mr. Fowle: That is true, also, on line 24. "Plaintiffs contend that the defendants combined"——

The Court: Yes. [3991]

Mr. Dixon: If this is coupled with the general charge, as I know it will be, any two or more combined and conspired, I have no objection to it.

The Court: Yes.

All right.

Mr. Fowle: On page 2, the first full paragraph, the word "defendants" is also used alone.

Mr. Dixon: I don't think it should necessarily be "and co-conspirators" in all places.

For instance, in line 23 it should be the way it is, "antitrust laws by the defendants," and what the plaintiffs contend, and so on. Then the plaintiffs contend that the defendants and alleged co-conspirators, if you want to put it in there I have no objection.

The Court: I don't think it hurts in or out on line 23. It is your position. If you want it out, I will take it out.

Mr. Dixon: I would rather have it out, because we are only seeking judgment against the defendants.

The Court: It is in on line 30 properly, and I don't think it belongs on line 3 of page 2. You don't claim that the co-conspirators monopolized, do you?

Mr. Dixon: No.

The Court: You claim the defendants monopolized?

Mr. Dixon: Yes. [3992]

Mr. Fowle: I wouldn't agree with that. The charge is that the defendants and co-conspirators

monopolized, and they did it successfully. They all did it.

It is true the jury doesn't have to find that they all did it, but that is the charge.

The Court: But the plaintiff can contend for less than his charge.

Supposing a defendant had a certain defense in, and you come to summarizing what his defense is, and he says "I am not going to rely on that," do you think it would then be proper for the court to want to put in a defense they don't want to rely on?

Mr. Fowle: No.

The Court: The plaintiff says, We are just relying on monopoly by the defendants.

Mr. Fowle: I don't wish to labor the point. It is true, also, on line 10 on the second page. [3993]

The Court: Well, I think it should go in there. You see where that is, Mr. Dixon?

Mr. Dixon: Yes. My only objection, as I said, your Honor, on this is, as long as it is made clear to the jury by proper instructions, as it will be, so they don't get the idea we have to prove that they were all——

Mr. Fowle: There is one further point on line 25 or 26, whichever it is, of the first page. The plaintiffs contend that the defendants and alleged co-conspirators combined, conspired and contracted.

That "and contracted" is the problem that we discussed this morning. I wasn't quite sure whether that aspect had been removed.

The Court: Here it is coupled with a "and." If it was "or," under what we did this morning, it

would be out. Here it is an "and" and it is properly in. What I did this morning was to eliminate it as an "or" standing by itself. We certainly didn't eliminate it any other way.

Mr. Williams: Well, I am not quite clear that I understand it. You mean one offense is conspiring and contracting, or is contracting a separate distinct offense?

The Court: It is the language of the statute.

Mr. Williams: It is "or contracting." I think contracting is a separate offense under the statute.

The Court: Here the contention is contracting is part [3994] of this conspiracy.

Mr. Dixon: That is correct.

Mr. Williams: Then it isn't a separate offense. If it is part of the conspiracy, then the words "or contracted" should come out, because they are included in the words "combined and conspired."

The Court: Objection overruled. I will give K as it is.

Now we will go back. Before we get to L, we go to plaintiff's 9, which we passed over because I was going to look over the Judge James instruction. I think it is a proper statement of the law. Any changes you want to make in it?

Mr. Dixon: No. It states the general law of conspiracy.

The Court: On line 5, the "or" should be "of," should it not?

Mr. Dixon: Oh, yes. That is a typographical error.

The Court: Any objections to 9?

Mr. Williams: It leaves out some of the material contained in the third paragraph of the Judge James form.

The Court: Well, I am going to pick up that later on. What is that?

Mr. Williams: Actually, No. 9 duplicates paragraph 3 of the James form as to what constitutes a conspiracy.

The Court: Then it leaves out what? Some of 3 or 4?

Mr. Williams: 3, I think.

The Court: There is a lot left out. Success or failure [3995] isn't important here. Well, it certainly doesn't cover all the law of conspiracy, because there are three instructions here, and then I have L proposed. So as far as it goes, and we will pick up loose ends later on, is there any objection to 9?

Mr. Williams: There is no evidence of any invitation to participate in the plan, so that statement should be omitted from the instruction. It is inapplicable to the facts of this case and tends to confuse the jury.

The Court: You can say an implied invitation.

Mr. Williams: But there isn't any evidence of any invitation. I am thinking of the factual situation.

Mr. Dixon: There is no direct evidence of any invitation, unless you want to take the invitation to Silzle as an invitation.

The Court: Then take it out.

Mr. Williams: The entire sentence comes out?

The Court: The entire sentence comes out. Any objection other than that? I will give it.

Mr. Dixon: That takes out the essence of the conspiracy which should be in the conspiracy part of the charge somewhere, Judge, as I know you are aware of.

The Court: We may have to work it over again. When we get through with them, you can look it over and see what is left out. [3996]

10? What is the objection to 10?

Mr. Williams: No objection.

The Court: All right. 11?

Mr. Williams: There should be a "common unlawful purpose."

The Court: Should be what?

Mr. Williams: An unlawful purpose in line 3, between "common" and "purpose" at the end of it. In this case there isn't any——

The Court: "Common unlawful purpose." Any objection to that?

Mr. Dixon: No.

The Court: Other than that, it is all right?

Mr. Williams: Yes. Again, this is the same subject matter covered in the James draft and we request the language of the James draft in paragraph 3.

The Court: You say you request the language?

Mr. Williams: Yes. We prefer the language in paragraph 3 of the James draft. The last two touched on parts of it.

The Court: Well, it's pretty close. I will give 11.

That brings us down to L. The first paragraphs I

composed and the second paragraph I copied off of James. What do you say to L?

Mr. Williams: No objection.

Mr. Dixon: Just a second, Judge, until I get L. It is right here at the bottom. Just a moment. [3997]

* * *

19?

Mr. Dixon: This is one, Judge, that I had in mind with reference to the application of the law of conspiracy and the proof, and the type of proof required, to the evidence in this case.

The court's L, in a sense, is background and essential, I think, to any conspiracy charge, but I suggested this one and had this in mind primarily because it is an application of the principle of the leading cases.

The Court: Let me read it.

Well, the word "intra" should come out in both places, shouldn't it?

Mr. Dixon: Yes.

The Court: It appears on line 13½ and line 17½.

"* * * but may be shown by circumstantial evidence," down at the next to the last line, and the way you have it worded, it is an indication to the jury they may draw this inference.

I think it should read, "may be shown by circumstantial evidence," and strike out "from," and say, "and from all just and reasonable inferences which may be drawn."

Mr. Fowle: How does that read?

The Court: The last two lines will read, after the words "circumstantial evidence," "and from"—strike out [3999] "which"—"all just and reasonable inferences which may be drawn."

Do you see what I mean?

Mr. Williams: Yes.

Mr. Dixon: It is satisfactory to the plaintiff as modified.

The Court: What are the defendants' objections? [4000]

Mr. Williams: The first objection is that it relates to an attempt to monopolize, because it relates only to an offense by Exchange Orange or Sunkist Growers. It is not related to a conspiracy charge in any way.

Mr. Dixon: This, Judge, relates to one of the six elements, or six acts charged to be a part of the conspiracy.

The Court: But the defendants' point is that you have got it tied down to monopoly, but not to any combination or conspiracy.

Mr. Williams: It also contains the words "or monopoly control" beginning at the end of line 14 and into line 15.

Mr. Dixon: Yes.

Mr. Williams: Which should come out.

Mr. Dixon: It should be in, because the alleged refusal is a part of the conspiracy to violate both Sections 1 and 2 of the Sherman Act.

Mr. Williams: Section 2 is in here in the preceding words in line 14, where it reads "or maintain a monopoly."

Mr. Dixon: "to eliminate the competition of the plaintiff in the interstate market." That is Section 1, that is your restraint of trade. "or to create or maintain a monopoly or monopoly control," that is your Section 2.

Mr. Williams: "or monopoly control" is not the language of Section 2.

Mr. Dixon: You are right. [4001]

Mr. Williams: When you say "or maintain a monopoly," that has covered Section 2, and the rest should come out.

Mr. Dixon: I have no objection to striking the words "or monopoly control."

The Court: All right. It may go out.

Don't you think there should be a reference, at about line 11, was pursuant to the combination or conspiracy?

Mr. Dixon: Of course the refusal here was made by both Exchange Orange and Sunkist. Now your question relates, I assume, to whether it should be further amplified? I mean, that is one of the parts of the conspiracy, and possibly it should be, Judge.

The Court: Insert after "pursuant to" on line 11, "the combination or conspiracy charged and a purpose." "or" wouldn't do it.

Mr. Dixon: What was that, now?

The Court: On line 11, after the word "to" insert "the combination and conspiracy charged and." [4002]

Mr. Dixon: I might suggest "the combination or conspiracy," not the "and."

The Court: "or conspiracy"?

Mr. Dixon: And then what is it?

The Court: Then go right ahead.

Mr. Dixon: If the word "or" is used between combination and conspiracy, the jury should be instructed as to the difference between the two, because the "or" implies there is a difference.

The Court: Well, it doesn't make any difference. I said I was going to give an instruction that combination and conspiracy meant substantially the same thing.

Mr. Fowle: Your Honor, there is really a more basic objection, I think, to this entire instruction. We would have no objection, of course, to an instruction in which you tell the jury that direct evidence isn't always necessary, that sometimes circumstantial evidence is sufficient, but to couple that kind of an instruction with an instruction which deals with a lot of other things and which, as a matter of fact, as you yourself pointed out a moment ago, again deals with only one of the six acts, seems to me to put this whole proposition of direct and circumstantial evidence to the jury in a light in which it should not be put. This deals with only one of the six acts. Now, you have an instruction, I believe, in your mimeograph material which, as I recall it, [4003] deals with the subject of direct evidence and circumstantial evidence, and we have no objection to that. But I think to couple it with one of the six acts charged in the amended complaint, and limit it to that would be misleading to the jury and prejudicial. We would, I think, most

certainly have an objection to this instruction on that ground.

The Court: Well, it presents a question of policy and it presents a question of what, for want of a better name, I term trying to even up the instructions. You get cases where you are trying to formulate your instructions and you get something that is lopsided, and sometimes an instruction which would otherwise be proper, you pull out. I will make a note of your suggestion on it, and you properly state the problem. That is this problem of direct and indirect evidence applies to all the evidence in a case.

Mr. Dixon: I agree to that, Judge, it does.

The Court: So I will know more about it when I look at these as a whole.

Mr. Fowle: May we mark this "held in abeyance"?

The Court: So that we will have a record that there won't be any question about, I am going to indicate a further change or two, and then I will indicate I will give it unless the matter comes up later on.

Down on line 18, I think there should appear "such a combination or conspiracy or [4004] purpose."

Mr. Dixon: "such a combination or conspiracy or purpose," is that correct?

The Court: Yes. Then I made a note "This applies to direct or indirect evidence in all respects. Should I use?"

I will pass on it later. Are there any other objections other than the objections noted?

Mr. Williams: This one has the limitation in it with respect to juice processed in California, and I recall that this morning they did not mention that limitation, that you can't monopolize the juice processed in California if it is the same type of juice, comparatively speaking, as that from Florida.

The Court: You may have that objection to all of these instructions. That is a general objection.

Mr. Williams: A general objection.

The Court: On your theory of what the instructions should be that runs to all of these.

Mr. Williams: Yes. If we may have just that general objection and it goes back to those where we did not state it, your Honor.

The Court: All right. 20. Can we get rid of 20?

Mr. Dixon: Yes, I think so, Judge. Take it out.

The Court: You are very agreeable today.

Now, before we go to 2, which is the remaining one there, I have looked over another instruction which we passed, [4005] instruction 5, which was this question we talked about in court yesterday, whether there was a question of fact. I don't think this is offensive now that I read it carefully. I think it actually leaves to the jury as a question of fact that problem. It now reads: I have inserted,

"The complaint defines citrus fruit juices as natural and frozen concentrate juices processed from by-product fruit. I charge you that the single-strength orange juice and other citrus juice products produced in California and sold in interstate

commerce constitute part of the total trade in commerce,"

There can't be any objection to that, because they do constitute a total part of these products.

"and may be the subject of restraint and monopoly under the Sherman Act."

Therefore, it is left to the jury under that instruction whether they have monopolized that part.

Mr. Williams: Our objection is that it does not clearly do that and it could be construed to mean that the court had already decided that it was an identifiable segment of commeree subject to monopoly. We feel there ought to be a specific instruction submitting that to the jury, and we have prepared one and served it today.

The Court: We *will that* up later. Let that ride for [4006] the time being. Of course, Mr. Dixon contends that almost as a matter of law I could say this is a segment.

Mr. Dixon: I think you could and it would be perfectly proper.

Mr. Fowle: Without any evidence at all?

Mr. Dixon: You have evidence here of a substantial volume of dollar commerce involving citrus juices processed in California and sold in commerce.

The Court: Let's go to 2. On line 8, after the words "conspire together and/or with others"——

Mr. Dixon: May I make this suggestion, your Honor, that we add the words "combine or conspire" since we have used that in the other charges?

The Court: "combine or conspire together"?

Mr. Dixon: "or with others."

The Court: I don't like that "and/or" either. It doesn't add anything.

Then I propose to add, "subject to other instructions concerning Capper-Volstead Act and Section 6 of the Clayton Act and exemptions therein contained."

Mr. Fisher: Just by an addition?

The Court: Yes, an addition to the instruction.

Mr. Fowle: May we have that language again, your Honor?

The Court: I thought you wrote it down. I will give it to you again. We were discussing these. I had another [4007] alternative which I discarded.

"Subject to other instructions concerning the Capper-Volstead Act and Section 6 of the Clayton Act and the exemptions contained therein."

In other words, your objection to this instruction is another one of your general objections where you disagree with my theory of the case. Your contention is that those exemptions are so broad that in no event could these defendants conspire among themselves, although you do concede, probably, that they could conspire with others?

Mr. Fowle: That is correct. We concede they could conspire with others, but it is our position that they could not conspire together.

The Court: Of course, the word conspire connotes either an illegal means or an illegal purpose. So when you say conspire among yourselves, that certainly sets it off aside from, let us say, the act of Sunkist and EOP of sitting down and saying,

"Now, let's make all the orange juice, make all the orange products into juice in Southern California. We want to do it because we want to make some money for our growers."

There they are acting together in concert but they are not conspiring. They are carrying out the purpose for which they are set up.

As soon as you say they conspire together, the cases [4008] and all the instructions will tell you that the word conspire is a dirty word and carries a connotation of unlawful means or an unlawful purpose.

I think you could find other analogies where people might do a certain act for one purpose and not violate the law, but when they do the act for another purpose, then they violate the law. It runs all through the criminal law on such matters where specific intent is required. In other words, a man does a certain act, and if you don't find the specific intent, it is a lawful act. If he does it with the specific intent, feloniously, unlawfully, and the terms that they use, then it is a felony.

We may be in disagreement, but I think fundamentally that is the distinction that I see in these sections.

Mr. Williams: I am not sure that we have had it pointed out, your Honor, that Sunkist and Exchange Orange should be treated as though they were a single company, and Exchange Orange is just one part of it.

The Court: I understand that point, too, but your objection on that ground is overruled. Do you have any further objection?

Mr. Williams: I think we stated all our objections to that when it first came up.

The Court: I will give it with that [4009] modification.

* * *

Now, let's start in on some of these defendants' instructions.

Let me say again, I had one general objection to your instructions, and I will tell you, in theory, what it was. This will come up time and time again.

You proceeded in your instructions to chop this case into little pieces, and then you took little piece A and said, "This act is lawful, therefore if you find that they did this, you will exclude this from your consideration." And you took B and said, "This is perfectly lawful," and excluded it.

That is one way to do it, but I disagree with you. It omits entirely the possibility that these acts together may be unlawful, and we have already discussed that as to my views on the interplay of the forces of the contracts and refusal. Do you follow me on that?

Mr. Fowle: Yes, we follow you.

The Court: Therefore—I may be wrong, but the view I take is that the contracts and the refusal, and some of these [4013] other things, too, are part of the forces or the background that was operating at the time the refusal was made, and therefore you can't chop it to pieces and say, This is legal, and this is legal, and then wash them all out as legal.

We may be able to do something with these.

That, I assume, was your purpose in the way these instructions were drawn.

Mr. Fowle: I might express the purpose a little differently than that, but I think that is generally correct. They were taking the six specific acts that we all know about. It was our view that those acts are charged as specific overt acts performed pursuant to a conspiracy, and that if the jury should find that any one of those acts was not done pursuant to this conspiracy, or with the purpose and effect of restraining trade, that it should not be considered by the jury, and that it was proper to approach the thing on this basis.

The Court: You get into metaphysics on this thing, then.

Let's take the TreeSweet contracts. This is one example. Suppose at the moment the TreeSweet contracts were entered into there was no intent or conspiracy, but they were entered into. They now exist. Suppose a minute after they are signed there comes into existence an intent, having in mind that these contracts are now in existence, what do you do about that? [4014]

Mr. Fowle: But that isn't the way the thing is charged in the complaint.

Mr. Dixon: I think, Judge, if I may inject my views into the matter for whatever they are worth, there is a basic principle of law that certainly applies—and I have the same objection noted in reference to some of these charges—that acts which may otherwise be lawful become unlawful when part of an illegal scheme or plan, such as a combination

or conspiracy to restrain or monopolize trade and commerce.

I think that is the only type of instruction of that kind that would be proper.

* * *

No. 2. Is defendant satisfied with 2?

Mr. Fowle: Yes, sir.

The Court: What is the plaintiffs' view?

Mr. Dixon: The second part of the sentence seems to me [4015] to be subject to question.

This instruction is a part of an entire instruction, I think, that was given in the case referred to in the citation, and in context it may be perfectly proper.

For example, if you are discussing motive and intent, that is one thing. But you can't pick it out——

The Court: I am interested in BAJI on this. This is a typical criminal instruction, but whether they ever give this civilly, or not——

Mr. Fowle: This came out of a civil case, your Honor.

The Court: You are in California now. This is California law. Where is the Cape Cod case?

Mr. Fowle: That is in Boston. It is a long way off.

The Court: We have moved 3,000 miles.

Did you find anything in BAJI on it? [4016]

Mr. Fowle: I didn't find one that I thought was as good as this.

The Court: What startles me is that we try

these jury cases day after day, we have a set of form instructions here, and you go through these cases and the thing never comes up, no lawyer ever raises it, and then here come a couple of Michigan boys out here, and you look at it and you just wonder.

Here is their evidence. It starts with 21.

If it was the law out here, you can rest assured that these defendant lawyers, who largely drew this book, would have it in here. And I suppose some of the big-shot plaintiff lawyers also helped.

Here is a standard instruction. No. 21:

"In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the burden of proof as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of the evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from [4017] which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue."

Mr. Fowle: That is the law in other places, too.

Mr. Dixon: In addition to that, may I refer to

the Standard Sanitary Manufacturing Company case, 226 U.S. 20, which is an early case, 1912, where the Supreme Court, in dealing at that time with the general question of purposes, and so on, said, even if additional purposes were involved, it would not justify the combination, since the Sherman Act can't be evaded by good motives.

This instruction puts it up to the jury, in a sense, whether they had a good motive, assuming that "good" and "lawful" are the same, or whether they had a bad motive.

Now, it isn't a question of motive in the Sherman Act in a civil case; it is a question of intent, perhaps, in a criminal case, but the motive with which you perform an act is wholly immaterial where you are dealing, in my judgment, with a statute such as the Sherman Act, which is malum prohibitum, not malum per se.

The Court: I have your point. [4018]

Now, over here we have not even used 21. We have used—by "we" I mean most of us around here—we have used what we call Civil 3. We have tried to boil down these instructions, and Civil 3 says:

"If the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, you must find for the defendant."

Now, let me look at one other thing. [4019]

I am trying to think of the Supreme Court case that Clark decided. It was a criminal case where they had a similar instruction, and he disapproved it and said it was confusing. You don't know the case that I am thinking about, do you?

Mr. Dixon: Offhand I don't. It wasn't an anti-trust case, I am sure.

The Court: It was a criminal case.

I will tell you what it was in. It was in the income tax cases, when the Supreme Court handed down the four decisions by Clark on income taxes.

That wasn't very long ago, was it?

Mr. Dixon: I think it was about a year or so ago.

Mr. Fisher: Was it the Helvering case?

The Court: No. These were criminal prosecutions on income tax.

Here they are. Holland was one of them.

Listen to this. This is a criminal case. In a criminal case a man's liberty is at stake, and if you are going to have a rule that applies in a criminal case, it ought to apply in a civil case. This is from Holland versus United States, 348 U.S. 140.

No, here it is.

Holland versus United States, 348 U.S. 139:

"Petitioners press upon us, finally, the [4020] contention that the instructions of the trial court were so erroneous and misleading as to constitute grounds for reversal. We have carefully reviewed the instructions and cannot agree. But some require comment. The petitioners assail the refusal of the trial judge to instruct that where the government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, (citing

cases), but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. (Citing cases and citing Wigmore.)

"Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities."

So that standard which has been used around here, [4021] that you can't find the defendant guilty unless every reasonable hypothesis of innocence is rejected, has been disapproved.

This isn't exactly like it, but it certainly squints at it.

Mr. Fowle: I would say that it is quite a long way from it.

The Court: "Equally susceptible of being interpreted."

Mr. Fowle: This instruction——

The Court: "Equally consistent with motive" and so forth. [4022]

Mr. Fowle: Correct. It seems to the defendants that motive in this case, in the minds of the jury, at least, is going to be a very important factor. The conduct in which the defendants engaged, the

conduct that is complained of here, might have been engaged in for perfectly valid business reasons, or it might have been engaged in with the motive that is suggested by the plaintiff. It seemed to us that it was very likely that the jury might—and I speak quite frankly, it seemed to us that it was quite likely that this jury might wind up not being able to tell whether the conduct was engaged in here for perfectly valid reasons or whether it was engaged in for some illegal purpose. It seemed to us that the jury ought to be instructed that if they can't tell what the motive was here, if they are left in doubt as to whether the defendants engaged in these transactions for perfectly valid reasons, or whether they engaged in them for some unlawful purpose, that they ought to be told to bring in a verdict for the defendants.

This instruction is really not taken out of context in the Cranberry case from which it comes. It is a proposition of law which Judge Wiscynski included in his instructions to the jury in that case, and he told the jury in that case that the question of motive was really the most important question in that case. We are going to get here very shortly to the whole problem of specific intent, and this [4023] is really related to that in a way.

The Court: The word motive—Judge Wiscynski, was it?

Mr. Fowle: Yes.

The Court: He has a very good reputation.

Mr. Dixon: He wrote the opinion in the Shoe Machinery case.

The Court: But motive and intent are generally in the law two different things.

Mr. Dixon: They certainly are, in my judgment, in the antitrust law.

The Court: I am going to reject No. 2 on the basis of what I said and on the Holland case, and on the ground it is covered by 3 and on the ground it is not a customary civil instruction given in California.

It seems to me the reason you fellows never read the Holland case is it follows Mead's Bakery, and when you got through reading Mead's Bakery you just quit reading and didn't read the Holland case.

Mr. Dixon: I have added for the record the Standard Sanitary case, your Honor.

Mr. Fowle: I take it that for the record we have an objection to any instruction that is refused?

The Court: No. I don't want you to be misled. As I understand these rules, and when you understand the rule and the purpose of it, you see what you have to do, the [4024] reason for your objections, not here, but this incorporation by reference, is to assist the court in correcting errors and, therefore, you have to tell the court why it was wrong. On this Las Vegas case, which you read, over there when I read the trial record, this defense attorney kept objecting on the ground the instruction was prejudicial to the defendant. That doesn't help the court at all. You are supposed to point out just what, as you have been doing, as you have pointed out here, just why I should give 2, but I don't

think you can merely sit upon your request without pointing out why it should be given.

Mr. Fowle: All I meant was that following the discussion in which we do point out why we think an instruction should be given, if your Honor refuses the instruction, I take it that is sufficient.

The Court: That's right. That is my understanding. Your objections to my refusal are overruled. [4025]

* * *

The Court: All right. No. 4. Well, are the defendants content with the form of it?

Mr. Fowle: As it is now?

The Court: Yes.

Mr. Fowle: Yes, your Honor.

The Court: It is inconsistent with other instructions that I have given, that they can conspire. I propose to reject it. Is there objection?

Mr. Dixon: I have an objection to it, your Honor, but since it has been rejected——

The Court: The point is this. I can't give this and [4032] let some of the others stand.

Mr. Dixon: It is entirely inconsistent with some of the others and does not correctly state the law.

The Court: I propose to reject it. Make your record.

Mr. Fowle: We object to the rejection of this instruction. I think we have discussed this at some length. Your Honor knows our views.

The Court: You may incorporate all your other objections at the time we were discussing this ques-

tion of whether EOP and Sunkist could conspire together, and so forth.

Mr. Fowle: Yes. I might say that as an alternative to this, we would accept the——

The Court: Do you want to work tonight or tomorrow?

Mr. Dixon: I would rather work tomorrow.

Mr. Fowle: I would, too.

(Interruption.)

Mr. Fowle: We would propose as an alternative the instruction which was contained in some draft of instructions which you submitted to all of us January 31st. Your proposed instruction contained the paragraph that is now in No. 4, with this addition, "but either or both Sunkist and its subsidiary EOP is capable of conspiring with other persons or corporations and the other alleged co-conspirators in this case are TreeSweet and Silzle." We would propose this instruction No. 4 with that addition. [4033]

The Court: I was hopeful I was going to convince Mr. Dixon to eliminate his contention—you remember we talked about that and he contended they could conspire among themselves. I really think they can, but I thought it would be one of the things we could take out of the case. I didn't succeed in convincing him, so my instruction was written at the time when I thought I was going to convince him of that fact.

Mr. Fowle: I simply want the record to show that we propose that as an alternative.